Introduction

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This issue carries the talks of last spring's lecture series on landmark cases that perhaps are less monumental than people have thought. Certainly all of these cases receive extensive treatment not only in my textbook, but in most collections of constitutional cases. Perhaps it is time to rethink them, and our five contributors at the least give us something to think about.

John Yoo has been in the news a great deal for his views on what Supreme Court cases mean in terms of limits on presidential power in wartime. The three cases that he discusses have always been assumed to impose strict limits on the Commander-in-Chief, but Professor Yoo suggests that this may not be what the cases—all dating from the Civil War era—mean today.

On my first day in "Federal Courts" in law school, the professor asked us what the case of *Erie Railroad v. Tompkins* (1938) meant, and after several of us mumbled things about there being no federal common law, he then said that, in essence, the rest of the semester would be devoted to seeing how *Erie* affects current federal-court jurisdiction. The question that Tony Freyer asks is whether "Old Swifty" was really as bad as it has been depicted, and whether *Erie* really made such a great difference.

The *Flag Salute Cases* are a staple of scholarship on the First Amendment, but the question is whether they significantly changed how the Court viewed the religion and speech clauses. The two cases, as Richard Morgan shows, make a wonderful story—but is it the story or the impact that has been the more lasting in importance?

No one knows more about *Dennis v. United States* (1951) than my good friend Michel Belknap, and so I have to sit up and pay attention when he says that the ruling remains important and should be considered a landmark case. Here I think Mike does what every good teacher wants to accomplish: He makes his students (readers) rethink some of their assumptions.

When *National League of Cities v. Usery* came down in 1976, many people praised it and its author, Justice William H. Rehnquist, as having begun the reversal of four decades of tilting the constitutional balance against the states in favor of the national government. But although Rehnquist would continue

to champion a new constitutional federalism, *National League of Cities* was soon reversed. Eugene Hickok looks at the ephemeral nature of what, at the time, seemed a turning point in the Court's federalism jurisprudence.

There have been a lot of books on the Court in recent years, and as we move from the "Rehnquist Era" into the "Roberts Era" there will no doubt be many more. Fortunately, we have the help of Grier Stephenson to sort out these books and to determine which ones are worth our perusal.

It is an interesting mix, this issue, and so, as always, enjoy!

Merryman and *Milligan* (and *McCardle*)

JOHN YOO*

It has been said that only Jesus and Shakespeare have been the subject of more works than Abraham Lincoln. But that doesn't mean we shouldn't still keep trying to get things right. I am going to be adding to that body of literature, on the relationship between Lincoln, the Supreme Court, and the Civil War.

The cases that I address here make up two-thirds of the three "m"s of the Supreme Court's encounter with the Civil War: *Ex parte Merryman*,[1] *Ex parte Milligan*,[2] and *Ex parte McCardle*.[3] All three case names bear the styling "ex parte" because all three were brought on behalf of citizens detained by the armed forces of the Union. All three detainees sought release under the ancient writ of *habeas corpus*, which requires the government to show the factual and legal grounds for detention to a federal judge. I will explain why the cases of the Civil War did not assume the landmark importance, despite their circumstances and language, of a *Marbury v. Madison*, *McCulloch v. Maryland*, or *Brown v. Board of Education*.[4]

Merryman was a Maryland militia officer who had blown up railroad bridges between Washington, D.C. and the North and was training secessionist troops in the earliest days of the Civil War. Milligan was the alleged leader of an insurgent force, sympathetic to the Confederacy, in Indiana, who was tried and sentence by a military commission—an old form of ad hoc military court established by commanders for the trial of violations of the laws of war and the administration of justice in occupied territory.

In these two cases, federal courts ordered the release of the petitioners on the ground that the military had exceeded its constitutional authority. Both opinions contained stirring language about the vitality of constitutional rights even under the pressure of wartime and the need to maintain checks and balances on the executive's powers. In *Merryman*, Roger Taney (as Chief Justice, writing an opinion in chambers) protested that the military had arrested suspected Confederates in Maryland and refused to recognize civilian authorities without the approval of Congress. Taney had ordered General George Cadwalader, commander of Fort McHenry, to appear in his courtroom on May 27, 1861, and to bring the imprisoned

Merryman with him. Cadwalader refused to obey. Taney held the general in contempt of court, but the U.S. marshal could not gain entry to the fort.[5]

Taney then issued an opinion ordering Merryman's release. The Constitution has "been disregarded and suspended," Taney wrote from his courtroom in Baltimore, "by a military order, supported by force of arms." He warned that "if the authority which the Constitution has confided to the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws." Instead, Taney proclaimed, "every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found."[6] He ordered the opinion and all of the proceedings sent to the new President "in order that he might perform his constitutional duty, to enforce the laws, by securing obedience" to his order.[7]

Milligan, decided five years later, sounded a similar theme. Justice David Davis declared that "[t]he Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." Rejecting Attorney General James Speed's argument (and Lincoln's) that the war gave the executive branch the right to hold Milligan and try him by a military court, the Court responded that "[n]o doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." Claims to the contrary risked "anarchy or despotism," and led from a false assumption, "for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority."[8] The Court held that the military could not detain and try Milligan, outside "the theatre of active military operations" where "the courts are open, and in the proper and unobstructed exercise of their jurisdiction." Only if a foreign invasion were "actual and present," rather than threatened, could martial law prevail.[9]

Nevertheless, neither *Merryman* nor *Milligan* has secured a place in the firmament of great Supreme Court decisions. *Merryman* remains unknown to almost all but those scholars who toil in the academic fields of the separation of powers or the early days of the Civil War.[10] As we will see, it did little to delay Lincoln from ordering the detention of suspected Confederate spies, sympathizers, and conspirators behind the Union lines. *Merryman* usually receives attention in the stories of the struggle between Unionists and Southern sympathizers in Maryland and the other border states. Rarely do we learn about the legal response to the opinion, which included outright presidential defiance and a critique of the role of the Supreme Court in American society. The *Merryman* opinion itself is rarely reproduced in prominent casebooks used for the teaching of constitutional law, which usually relegate the case to a one-paragraph note in discussions of the debate over judicial review.

Milligan, on the other hand, has seen a burst of attention in this decade. This is entirely due to the Bush administration's policies in the war on terrorism and the associated cases taken up by the Rehnquist Court. Aside from this recent interest in the decision, *Milligan* usually goes unexamined and unremembered. In his Pulitzer Prize–winning **The Fate of Liberty: Abraham Lincoln and Civil Liberties**, historian Mark Neely titled a chapter "The Irrelevance of the *Milligan* Decision."[11] Despite the opinion's broad language, for example, military trials continued throughout the occupied South. As Neely observes, scholars were no kinder to the decision. The first American encyclopedia on political science, published in 1881, provides an entry on military commissions that holds that they can be used

for purposes directly contrary to *Milligan*. Professor John Burgess of Columbia University, the leading political scientist on Reconstruction at the turn of the century, wrote in 1890 that "it is devoutly to be hoped that the decision of the Court may never be subject to the strain of actual war. If, however, it should be, we may safely predict that it will necessarily be disregarded."[12]

Remembrance of *Merryman* and *Milligan* usually occurs during wartime. This should come perhaps as no surprise, as that is the context within which they were decided. But they usually do not have much effect. During World War I, neither *Merryman* nor *Milligan* had any direct relevance because no military commissions or detentions occurred on American soil. In World War II, the Supreme Court narrowed *Milligan* to its facts. In *Ex parte Quirin*, the Court upheld the military detention and trial of Nazi saboteurs—two of whom were American citizens—on the orders of President Franklin Roosevelt.[13] According to the unanimous *Quirin* majority, *Milligan* stood for the proposition that the military could not apply the laws of war to civilians in areas outside the battlefield where the civilian courts remained open. But it did not apply to those covered by the laws of war, namely combatants. "Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war," the Court held.[14] *Milligan* had no effect on the Court's decision in *Korematsu v. United States*, which upheld FDR's order for and Congress's approval of the military detention of about 120,000 Japanese Americans for their suspected disloyalty.[15]

Milligan's lack of relevance has continued to this day. In *Hamdi v. Rumsfeld*,[16] a four-Justice plurality upheld the detention of an alleged terrorist, captured in Afghanistan but a U.S. citizen by birth, but required judicial review of the detention to protect due-process standards. Nevertheless, the *Hamdi* plurality concluded, *Milligan* did not require a civilian trial because it did not apply to prisoners who had joined or associated themselves with enemy forces. Both *Hamdi* and the later *Hamdan v. Rumsfeld*[17] take *Quirin* as the relevant gloss over the original *Milligan* precedent. Today's law schools do only slightly better. Most leading casebooks relegate *Milligan* to summary notes of no more than one or two pages. Most concentrate on *Quirin* or the cases decided in the last four years. Professors probably spend more time teaching students about the Supreme Court's protections for the national market in milk.

McCardle, whose case provides the epilogue to our story, was a Vicksburg, Mississippi newspaper editor tried by military commission for publishing "incendiary and libelous" articles and calling for violence against Union authorities. Because of *Milligan*, Congress stripped the Supreme Court of jurisdiction in *McCardle* and prevented the Court from reviewing the constitutionality of military Reconstruction. Without going too much into the details of *McCardle*, the decision may help us understand why *Merryman* and *Milligan* were the landmarks of constitutional law that never were.

I.

Lincoln was confronted with national security challenges that no other American President has ever faced. This was true with the Civil War *in toto*, the deadliest, most destructive war in our history, in which American fought American and brother fought brother. It was also true in the personal sense. Except for James Madison's flight from the capital in the face of British invaders in 1814, the nation's government has never been under direct threat of immediate attack as it was during the Civil War. When the South seceded, Washington, D.C. was the mid-nineteenth century version of West Berlin—an island of freedom surrounded by a sea of enemy territory. On the one side lay Virginia, the very capital of the Confederacy. You can see General Robert

E. Lee's ancestral home in Arlington from downtown Washington. On the other side was Maryland, a slave state that had gone for John Breckinridge of Kentucky (as had all of the states of the Deep South) in the 1860 election. The only rail links between the North and the nation's capital passed through Maryland. Throughout the Civil War, even as late as 1864, Confederate forces periodically threatened the capital with attack.

That precarious strategic situation made it imperative that the Union secure the border states such as Maryland. Lincoln reportedly said, for example, that while he welcomed God's support, he must have Kentucky's. He could just as easily have said that of Maryland. It was the necessity to ensure that Maryland remained in the Union that led to *Merryman*. When Fort Sumter fell, it appeared to Northerners that Maryland might join the states of the upper South in secession. Sumter surrendered on April 14, 1861; the next day, Lincoln issued a proclamation requesting 75,000 volunteers to suppress the rebellion and enforce federal law.[18] Lincoln's intention to use force to compel the Southern states to return to the Union prompted Virginia, North Carolina, Tennessee, and Arkansas to secede. Sentiment to follow their example in Maryland was strong. Maryland's governor and Baltimore's mayor telegraphed Lincoln to warn him to "send no troops here."[19] Lincoln had even had to travel secretly through Baltimore on his way to his inauguration.

Maryland's resistance quickly turned violent. Rushing to defend Washington, D.C. on April 19, the Sixth Massachusetts regiment was attacked by a secessionist mob as it switched railroad lines in Baltimore. Four soldiers and a dozen civilians were killed. For the following week, Maryland rebels succeeded in isolating the capital from the North. The mayor and chief of police in Baltimore ordered the destruction of the railroad bridges running to the North. Secessionists cut the telegraph lines between the North and the capital. Washington officials expected a Confederate attack on the defenseless capital at any moment. It would not be until April 25 that reinforcements from New York arrived, and only then by bypassing Baltimore to the east.

Meanwhile, Lincoln and his advisors worried about how to keep Maryland in the Union. At first, Lincoln presented his homespun humor, but within it was a steely determination. On April 22, a delegation of the Baltimore YMCA came to see him and asked that he stop federal troop movements and make peace with the Confederacy. Lincoln exclaimed that they "would have me break my oath and surrender the Government without a blow." "There is no Washington in that—no Jackson in that—no manhood nor honor in that." He explained that in order to defend the capital, Union troops must cross Maryland. "Our men are not moles, and can't dig under the earth; they are not birds, and can't fly through the air."[20] "Keep your rowdies in Baltimore," he warned, "and there will be no bloodshed." Lincoln took a prudent attitude toward the state government. General-in-Chief Winfield Scott proposed to arrest the Maryland legislature when they met on April 26, rather than let them secede. Lincoln, however, ordered him off to await the outcome of their deliberations; if they did vote to secede, he ordered Scott "to the bombardment of their cities—and in the extremist necessity, the suspension of the writ of habeas corpus."[21] Lincoln's April 25 order appears to be the first official mention of the idea of suspending the writ, and its tie to the other option of bombarding Maryland cities reflects the extreme pressures on the President. Luckily, the legislature did nothing.

Nevertheless, concerns about rebel marauders and the security of the rail link between Washington and Maryland led Lincoln to take that step of "extremist necessity" just two days later. In an order to General Scott, the President declared that "[y]ou are engaged in repressing an insurrection against the laws of the United States." "If at any point on or in the vicinity of the military line, which is now used between the City of Philadelphia and the City of

Washington, . . . you find resistance which renders it necessary to suspend the writ of Habeas Corpus for the public safety," Lincoln authorized Scott to do so.[22] Scott immediately authorized the commanders in Pennsylvania, Maryland, Delaware, and Washington to suspend the writ if necessary.[23] Neither Lincoln nor Scott publicized the order, nor did they issue it as a public proclamation, nor was it sent to the courts or Congress at the time.[24] Lincoln would publicly suspend the writ in Florida in a public proclamation on May 10.[25]

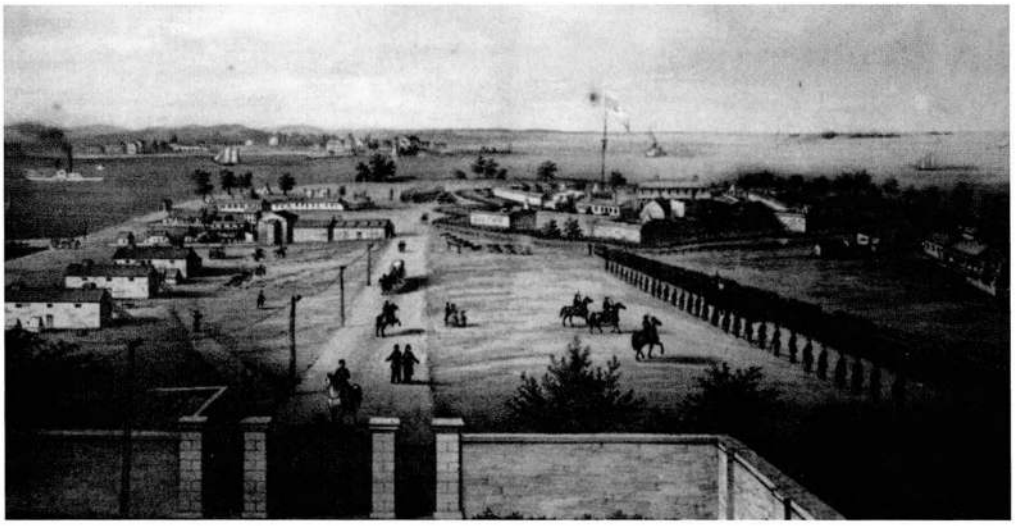
John Merryman was one of the Maryland citizens swept up by Union troops after the suspension of habeas corpus. He was a farmer and an officer in the Maryland militia. Union officers accused him of drilling a secessionist cavalry unit that had participated in the destruction of the railroad bridges and telegraph lines to the North in April. Troops arrested him at his home on May 25, 1861 and imprisoned him at Fort McHenry.[26] Merryman immediately petitioned for a writ of habeas corpus directly with Chief Justice Taney in Chambers at the Supreme Court, rather than to the federal court in Baltimore. In one of those happy historical coincidences, Merryman's father and Taney had gone to Dickinson College together.[27] Chief Justice Taney, of course, was a Marylander who had become Andrew Jackson's Attorney General and then Secretary of the Treasury during the great Bank War. As Chief Justice, he had written the majority opinion in *Dred Scott v. Sanford*,[28] which, by holding the Compromise of 1850 unconstitutional, had hastened the coming of the Civil War.

Taney moved with alacrity to defend Merryman's rights, but with little success. He personally rushed to Baltimore to take up the case, rather than waiting in the capital. He issued a writ the very next day to General George Cadwalader, commander of Fort McHenry, to appear before him and to bring Merryman with him.

Cadwalader was no simple-minded soldier, but the son of a distinguished Philadelphia family. Law and war ran in his blood. He was a peculiar American breed of soldier-lawyer in the tradition of Colonel Alexander Hamilton and General Henry Halleck. His grandfather, John Cadwalader, was a brigadier general in command of Pennsylvania troops during the Revolutionary War. He had served under Washington at the battles of Trenton and Princeton. He was supposed to support Washington's crossing of the Delaware, but couldn't get his artillery across the frozen river. His father, Thomas Cadwalader, graduated from the University of Pennsylvania, entered the bar, and reached the rank of major general in command of the First Division of the Pennsylvania militia during the War of 1812. The pressure was on for son George. Born in Philadelphia in 1806, he went to Penn like his father and was admitted to the bar at the ripe old age of 20. He became a general and served with distinction in the Mexican-American War of 1848. His brother was a federal district judge in Philadelphia at the outbreak of the Civil War.

Cadwalader sent an aide to Taney's courtroom in full military regalia to notify the Chief Justice that neither he nor Merryman would appear. The aide relayed Cadwalader's response, that "he is duly authorized by the president of the United States . . . to suspend the writ of habeas corpus, for the public safety." Although this was a "high and delicate trust" and one to be exercised "with judgment and discretion," the General claimed his instructions were "that in time of civil strife, errors, if any, should be on the side of the safety of the country." He asked for a postponement of the proceedings until he could receive instructions from President Lincoln.[29] Taney instead issued an immediate contempt order against Cadwalader. But the U.S. marshal was denied entry at the gate of the fort.

Taney was left to issue an opinion, which sought to pull the heart out of Lincoln's energetic response to the fall of Fort Sumter. The Constitution's discussion of the suspension occurs in one sentence, in Article I, Section 9, and it does so in the passive voice: The



When Chief Justice Roger Taney ordered General George Cadwalader, commander of Fort McHenry, to appear in his courtroom on May 27, 1861, and to bring John Merryman with him, Cadwalader refused to obey. Taney held the general in contempt of court, but the U.S. marshal was unable to gain entry to the fort (pictured), where Merryman, a Maryland militia officer accused of sabotaging railroad bridges in Union territory, was being detained.

"Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Taney held that the Suspension Clause's placement in the Article where Congress's powers lay, and the judicial commentary since ratification, recognized that only Congress could suspend the writ. If military detention without trial were permitted to continue, Taney wrote, "the people of the United States are no longer living under a government of laws." Without congressional suspension, "every citizen holds life, liberty and property at the will and pleasure of the army officer." Taney's opinion not only found Lincoln's suspension unconstitutional, but also clearly questioned the legal bases for Lincoln's other unilateral responses to secession, such as the calling up of volunteers, the imposition of a blockade on Southern ports, and the withdrawal of funds from the Treasury to raise an army.

Taney's decision in *Merryman* was an attack, not just on Lincoln's suspension of the writ, but upon the President's right to interpret the Constitution as well. Lincoln had come to office attacking the Supreme Court for its decision in *Dred Scott*. During the Lincoln–Douglas debates, he had argued that the Court's decision only applied to the slave and owner in the case itself, and not to any other cases. In his first Inaugural Address, Lincoln declared that "if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent, practically resigned their government, into the hands of that eminent tribunal."[30] The Court had lost immense prestige, at least with Republicans, who rejected the idea of judicial supremacy behind the decision in *Dred Scott* and suspected the federal courts of supporting slavery and the South.

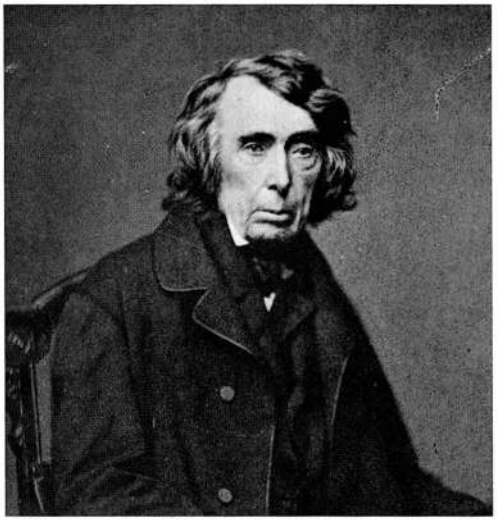
For Taney, however, the President's oath to uphold the Constitution required him to carry out the Supreme Court's orders. The *Merryman* decision was another declaration of judicial supremacy in interpreting the Constitution, to be expected of the Justice who wrote *Dred Scott*, though perhaps not from President Andrew Jackson's former Attorney General.

Taney clearly wanted to dramatize the conflict between the President and the judiciary. He appeared before a crowd of 2,000 on the Baltimore courthouse steps to receive General Cadwalader's response, and declared that the general was defying the law and that he, too, might be under military arrest soon.

Public response to Taney's decision in the North was, for the most part, withering. "The Chief Justice takes sides with traitors, throwing around them the sheltering protection of the ermine," the *New York Tribune*, probably the North's most influential newspaper, thundered. "When treason stalks abroad in arms, let decrepit Judges give place to men capable of detecting and crushing it." It claimed that Taney had engaged in "a gross perversion of [the Court's] powers to employ [the writ of habeas corpus] as the protecting shield of rebels against a constitutional government." It concluded that "[n]o Judge whose heart was loyal to the Constitution would have given such aid and comfort to public enemies." Nor did the *New York Times* display much charity to the elderly Chief Justice: "Too feeble to wield the sword against the Constitution, too old and palsied and weak to march in the ranks of rebellion and fight against the Union, he uses the powers of his office to serve the cause of the traitors." A few Republican organs supported Taney, concluding that although Lincoln's actions might be necessary, the Court should not bless them, but instead should enter the violation of the Constitution on the record, "to stand as a warning, in more peaceful times yet to come, that here is an act, the necessity of which was the justification, and which is not to be made a precedent at any time when the public exigency is less pressing."[31]

Lincoln answered Taney—and the widespread claims of executive dictatorship—in his message to the special session of Congress on July 4. Lincoln stressed that the Confederacy had fired the first shot, before Lincoln or the national government had taken any action that might threaten slavery. The South's action, therefore, was not a response to any unconstitutional action of the government, but an effort to overturn the results of democratic elections and a rejection of the constitutional process of "time, discussion, and the ballot box."[32] In response, Lincoln argued, "no choice was left but to call out the war power of the Government; and so to resist force, employed for its destruction, by force, for its preservation." Lincoln claimed he had responded with the support of public opinion. "These measures, whether strictly legal or not, were ventured upon, under what appeared to be a popular demand, and a public necessity; trusting, then as now, that Congress would readily ratify them." Lincoln avoided the question whether he had acted unconstitutionally, but justified his actions on Congress's political support after the fact. "It is believed that nothing has been done beyond the constitutional competency of Congress." Congress soon enacted a statute that summer not explicitly authorizing war against the South, but rather declaring that Lincoln's actions taken that spring "respecting the army and navy of the United States, and calling out or relating to the militia or volunteers from the States, are hereby approved and in all respects legalized and made valid," as if "they had been issued and done" by Congress.[33]

Lincoln directly responded to the Chief Justice, too, but not by name. He acknowledged that the "legality and propriety" of the suspension had been questioned, and that the "attention of the country" had been directed to his presidential duty to take care that the laws are faithfully executed. He made a nod toward the idea that the government could violate a single law, if that act would save the country. "Are all the laws, *but one,* to go unexecuted, and the government itself go to pieces, lest that one be violated?"[34] Lincoln argued that he would break his oath to preserve, protect, and defend the Constitution if he blindly obeyed one provision above the survival of the Republic. But Lincoln was too good a lawyer to rely solely on claims of a Lockean prerogative. He claimed that the Suspension Clause's



Taney's decision in *Merryman* was an attack, not just on President Abraham Lincoln's suspension of the writ of habeus corpus, but upon the President's right to interpret the Constitution. Taney (pictured) clearly wanted to dramatize the conflict between the President and the judiciary: He chose to appear before a crowd of 2,000 on the Baltimore courthouse steps to receive General Cadwalader's response.

passive tense left open who could suspend the writ. "As the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented . . . by the rebellion." Lincoln promised a legal opinion from Attorney General Edward Bates, which was issued the next day, to provide a more complete justification. Drawing on the *Federalist*, Bates's opinion argued that each branch of the government was co-ordinate and could independently exercise its unique constitutional powers free from the orders of the other.[35]

Taney lost in his confrontation with Lincoln. The administration continued the system of military detentions. Later that summer, Lincoln ordered the detention of Maryland legislators, the step he would not take in April. In October, the administration expanded the authority of generals to suspend habeas corpus from Washington all the way up the "military line" to Maine. Lincoln delegated to Secretary of State William Seward the supervision of military arrests in the first year of the war. Seward allegedly told the British ambassador to the United States that he could "ring a little bell on his desk" and arrest any citizen in the nation. "Can the Queen of England do as much?" he asked. Despite this anecdote, the most reliable estimates indicate that the government detained 864 civilians—approximately half were from the border states, while a third were Southerners—until the War Department took over detentions in 1862. Lincoln would suspend habeas nationwide on September 24, 1862, two days after releasing the preliminary Emancipation Proclamation, in a move to prevent opposition to the first conscription law.[36] Congress would not enact a law authorizing the suspension of habeas corpus and instituting a system of review until March 3, 1863, finally curing the defect claimed by *Milligan*. Historian James G. Randall, author of the widely read **Constitutional Problems under Lincoln**, estimated that the Lincoln administration detained approximately 13,500 people.[37] Neely's more recent work puts the number at about 12,600, though the records are incomplete.[38]

Supporters of the Union came to believe that these measures had saved Maryland from secession. *Merryman* had become a footnote to the start of the war, rather than a landmark for the development of internal security policies during it. Writing on *Merryman*, Harvard historian Charles Warren observed that the lack of popular support for the Court depressed the Chief Justice. Writing in 1863, Taney despaired that the Court would not "ever be again restored to the authority and rank which the Constitution intended to confer upon it." He concluded that the "supremacy of the military power over the civil seems to be established, and the public mind has acquiesced in it and sanctioned it." Nevertheless, Warren argued, if Taney had lived another four years, he would have seen his opinion followed to the full in *Ex parte Milligan*. "Never did a fearless Judge

receive a more swift or more complete vindication," Warren wrote.[39]

But did he?

II.

Milligan was not just a vindication of *Merryman*, but a dramatic expansion of it. *Merryman* had demanded that Congress suspend the writ of habeas corpus. *Milligan* addressed a broader subject: Even if the writ were suspended, could the President and Congress subject civilians behind the lines to military trials, when the civilian courts were open and functioning? Unlike *Merryman*, *Milligan* did not reach the Justices under the pressure of secession and sabotage, but came up after the assassination of President Lincoln and Lee's surrender at Appomattox. Yet *Milligan* drove the courts into conflict once more with the political branches; this time not with the President, but with Congress.

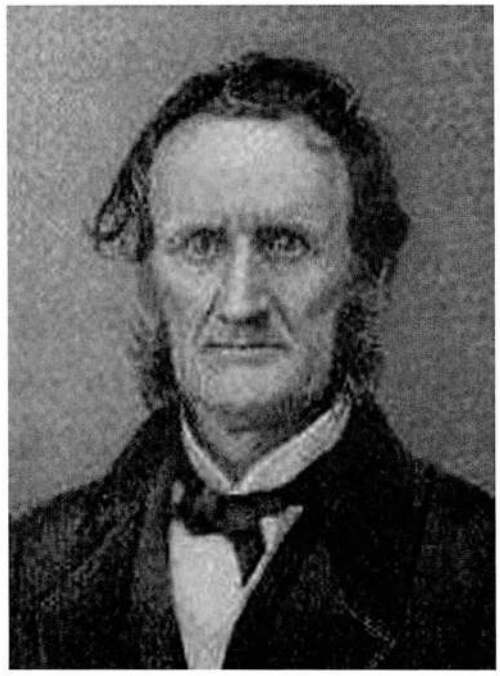
Milligan took place in the midst of interbranch strife over the future of Reconstruction. The issues were complex and centrally involved the Constitution. If the Confederacy were considered an enemy nation, the laws of war permitted recaptured territory to be subject to occupation by Union military authorities. But if the Southern states had never left the Union, as Lincoln had argued from the beginning, then they could claim an immediate restoration of their political rights. They could again pass their own laws, run their own courts and police, and exercise their rights in the federal government, which could have included voting on the appropriations for the army and blocking legislation to protect the new freedmen. In the unprecedented circumstances of the Civil War, there were no rules for the readmission of rebellious states to the Union or how much authority the national government could exercise in occupied territory.[40]

Milligan came to the Court just as President Andrew Johnson and radical Republicans in Congress were reaching their fateful split over Reconstruction policy. Johnson sought relatively lenient conditions for readmission of the Southern states to the Union. He declared the war over in December 1865 and allowed Southern states to re-establish governments, sometimes with former Confederates in positions of power. Johnson also offered amnesty to those who swore an oath of loyalty to the Union. He did not demand of the Southern states any more protections for the freedman than ratification of the Thirteenth Amendment—meaning that the rights of the former slaves would be governed by state law—and did not ask states to grant the freedmen suffrage. Southern states responded by adopting new constitutions that recognized the end of slavery, but little more. Their legislatures quickly enacted "Black Codes," which sought to keep the freedmen in a state of second-class citizenship by restricting their economic and political rights. They held elections that sent Congressmen and Senators, including former Confederate Vice President Alexander Stephens and former generals and officials of the Confederacy, to the sitting of the 39th Congress in December 1865. Johnson sought a swift reunion of the sundered Union by using the powers of Lincoln's energetic executive, which would set Reconstruction policy, to restore the respect for state sovereignty of the antebellum Constitution.

Congress would have little of it. Two-thirds Republican, Congress refused to seat the elected representatives of the new Southern governments. Radical Republicans wanted to provide the freedmen with a level of economic and political equality denied them by the Southern governments. In April 1866, Congress enacted the Civil Rights and Freedman Bureau bills over President Johnson's veto. Radicals also believed that military government had to continue in the South because Union troops were the surest guarantee for the security and rights of the freedmen when state governments in the South could not be trusted. President Johnson went to the country to oppose the radicals, but the 1866 midterm elections gave them a tremendous victory. In less

than two years, they would use their majority to place the South under military government, strip the Supreme Court of jurisdiction, and bring Johnson within one vote in the Senate of being the only President impeached and removed from office.

Milligan came to the Court in the midst of this strife and had a significant impact on the struggle, but its origins reached back two years to the tentative months when Abraham Lincoln's re-election had been in doubt. Lambdin Milligan was an Indiana Copperhead Democrat who wanted peace with the Confederacy. In an odd coincidence of history, he had joined the Ohio bar and placed first in the same examination as Edwin Stanton, who would become Lincoln's Secretary of War and would approve Milligan's detention and conviction. Milligan fervently believed that secession was legal and that Lincoln and the Union had overstepped their constitutional authority in waging the Civil War. He took an active role in Democratic politics in Indiana and ran for the party's 1864 nomination for Governor, but his strict anti-war position lost.[41]



Lambdin Milligan (pictured) was an Indiana Copperhead who fervently believed that secession was legal and that Lincoln and the Union had overstepped their constitutional authority in waging the Civil War.

His opposition apparently went beyond political measures. Milligan joined secret Democrat societies known as the Order of American Knights and the Sons of Liberty. With Indianapolis printer Harrison Horton Dodd as the Grand Commander, Milligan was appointed a "major general" of the Sons of Liberty, along with a few other prominent Democrats in the state. Although they planned attacks on prisoner of war camps, rebellion against Union authority, and establishment of an independent Northwestern Confederacy, none of these plans came to fruition. That did not stop Dodd, however, from accepting money from Confederate spies in Canada to pay for the planned revolt. Acting on a tip by an informant, Union officers found 400 revolvers and ammunition at Dodd's printing shop.

The conspiracy suited the needs of the powerful Republican Governor, Oliver Morton. Worried about his re-election and the fate of the Republican party in the 1864 elections, Morton ordered the arrest of Milligan and his fellow conspirators. Morton appears to have urged a military trial because its proceedings would run from September to December, at the same time as the election season.[42] Successfully draping Indiana Democrats in the mantle of disloyalty, Morton won re-election by a comfortable margin in October, as did Lincoln in November, no doubt helped more by Sherman's capture of Atlanta than anything else.

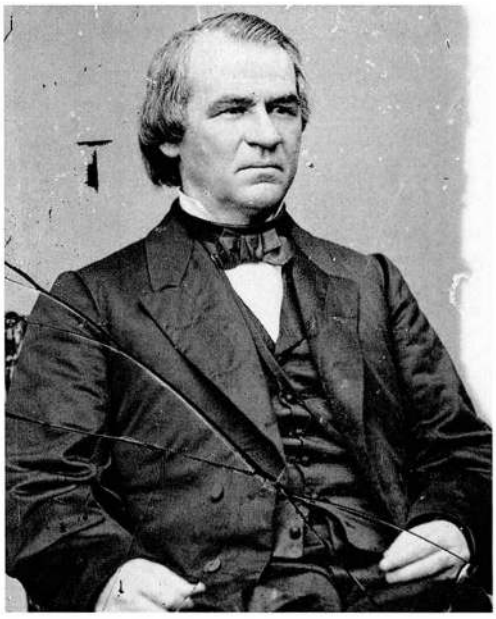
At the end of the proceedings, a military commission of seven army officers convicted four of the conspirators. It sentenced three of them, including Milligan, to death. It had not helped that the ringleader, Dodd, escaped from his room above the post office and made it to Canada, and that one of Milligan's comrades had turned state's evidence. With his re-election secure, however, Governor Morton decided to recommend commutation of their sentences to the military authorities, who remained unmoved. His opponent in the election,

THE COPPERHEAD PARTY.—IN FAVOR OF *A VIGOROUS PROSECUTION OF PEACE!*

Copperheads (portrayed negatively in the cartoon shown here) were Northerners who sympathized with the Confederacy. Milligan and his co-conspirators planned attacks on prisoner of war camps and hoped to establish an independent northwestern Confederacy. Although they accepted money for the planned revolt from Confederate spies, their plans never came to fruition.

Democrat Joseph E. McDonald, a former congressman and state attorney general, journeyed to Washington to personally meet with Lincoln to plead for clemency. Lincoln read over the trial record, found some errors, and told McDonald that there would be "such a jubilee over yonder" in Virginia—anticipating Lee's surrender to Grant—that "we shall none of us want any more killing done."[43] He promised McDonald that "I'll keep them in prison awhile to keep them from killing the Government."[44] Lincoln's assassination on Good Friday, April 14, 1865, prevented him from keeping his promise. President Johnson, who had convened a military commission to quickly try and execute the assassins, was in no mood for mercy and approved the death sentences of Milligan and his co-defendants.

On May 10, Milligan filed for a writ of habeas corpus in the federal circuit court in Indianapolis. The next day, the two federal judges on circuit—Justice David Davis and Judge David McDonald—sent a remarkable letter to the President. They asked that Johnson delay execution of the sentence until the federal courts had time to determine whether military commissions had jurisdiction over civilians unconnected to the military. Unlike Chief Justice Taney, they did not appear to believe that they had the authority to order the President to suspend the executions. Instead, they argued that allowing the executions would open the government to the charge of oppression and would be a stain on the national character. They also doubted the wisdom of the policy. The judges did not question "the guilt of these men" or that their trial "had a most salutary effect on the public mind by developing and defeating a most dangerous and wicked conspiracy against our government."



President Andrew Johnson (pictured), who had convened a military commission to quickly try and execute the assassins, was in no mood for mercy and approved the death sentences of Milligan and his co-defendants. But he soon commuted it to life imprisonment so as not to make them martyrs.

Rather, they argued that the trial had achieved its purpose and that Indiana was now "quiet and peaceable." Executing Milligan and his comrades now would only make them "political martyrs."[45] Edwin Stanton also put in a plea for his former bar mate. Johnson ultimately commuted Milligan's sentence to life imprisonment.

The two judges on the circuit sent the case to the Supreme Court, which heard oral arguments on March 5, 1866. Milligan's counsel added three shrewdly chosen co-counsels: Jeremiah Black, who had been chief justice of the Pennsylvania supreme court and Attorney General and Secretary of State in the Buchanan administration and had been defeated for confirmation to the Supreme Court in 1861 by one vote; James A. Garfield, a brigadier general during the opening years of the Civil War at age 31, Republican congressman from Ohio, and future President; and David Dudley Field, brother of sitting Justice Stephen J. Field and father of the Field Code that was the basis of American civil procedure in the nineteenth century. As Milligan's chances rose with these wise choices, the government's odds dropped with its own. In addition to Attorney General Speed, who was not thought of as an able oral advocate, the government added Henry Stanbery, who would replace Speed as Attorney General that summer and would be nominated by Johnson to a seat on the Supreme Court (Congress reacted by decreasing the size of the Court by one seat); and, inexplicably, General Benjamin Butler, a Massachusetts lawyer who had won notoriety for his tough occupation government of the City of New Orleans. For example, Butler had issued General Order No. 28, which declared that any woman who showed disrespect to a Union soldier or officer would be treated as "a woman of the town plying her avocation." He would be known as "Beast Butler" throughout the South for decades. After an unsuccessful military career, Butler would be elected to the House of Representatives and would be the lead House prosecutor of the Johnson impeachment before the Senate.

The transcript of oral argument is lengthy, occupying 62 pages of the **U.S. Reports**. Each side received three hours of time—not exactly the days accorded Daniel Webster, but a luxury under today's standards. On April 3, 1866, the Court announced that it was ordering the release of Milligan, who went free on April 10. However, the Court did not release its opinion until December 14. Justice Davis, who had objected to the military commissions as the circuit justice for Indiana, wrote for the Court that these new tribunals had no jurisdiction over a citizen who was not a resident of one of the rebellious states, not a prisoner of war, and not in the armed forces of the Confederacy or the Union. The laws of war, which applied to combatants and the battlefield, held no sway over "citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."[46] The Bill of Rights demanded

that Milligan receive a jury trial in federal court for violations of civilian law, and these provisions could not be waived in the face of emergency. "Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate." Neither the President nor Congress, therefore, could impose martial law that overrode the constitutional protections in a criminal trial, except in cases of actual invasion in which the "courts and civil authorities are overthrown."[47] What was good for the occupation of Virginia, Davis concluded, was not good for Indiana.

Chief Justice Salmon P. Chase wrote a concurring opinion, joined by three other Justices. He found that Milligan fell within the Habeas Corpus Act of 1863, which had authorized Lincoln to suspend the writ of habeas corpus. The Act required the military to supply the courts with lists of prisoners, and to release the prisoners if a grand jury did not choose to indict them of a crime. Milligan had not been indicted by a grand jury, so he was entitled under the statute to go free. Chase refused to reach the question of whether the President and Congress together could authorize the use of military commissions in wartime. "When the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what states or district such great and imminent public danger exists as justifies the authorization of military tribunals."[48] Chase would have allowed Congress to authorize military tribunals in wartime even when the courts were open: a necessity, he argued, because the courts might prove incompetent to stop threatened danger or judicial officers might be aligned with the rebels.

It was not the judgment in *Milligan* that was particularly objectionable, but rather the reasoning of the Court's opinion. Congress's authority was not directly presented in *Milligan*. Justice Davis's desire to address its scope, and to limit it in such broad terms, immediately plunged the Court into the maelstrom of Reconstruction politics. When the Court announced the opinion in December, its implications for congressional plans for Reconstruction were obvious to all. *Milligan* suggested that any continuation of military occupation in the South was unconstitutional, and it signaled that Republicans would have to count the judiciary among their opponents. The Republicans immediately recognized *Milligan* as a challenge, with Thaddeus Stevens declaring it to be a "most injurious and iniquitous decision" that "has rendered immediate action by Congress upon the question of the establishment of governments in the rebel States absolutely indispensable."[49] "In the conflict of principle thus evoked, the States which sustained the cause of the Union will recognize an old foe with a new face," wrote the *New York Times*. "The Supreme Court, we regret to find, throws the great weight of its influence into the scale of those who assailed the Union and step after step impugned the constitutionality of nearly everything that was done to uphold it."[50] Comparing *Milligan* to *Dred Scott*, *Harper's Weekly* declared that "the decision is not a judicial opinion; it is a political act." The *New York Herald* raised the idea of reforming the Court: "a reconstruction of the Supreme Court, adapted to the paramount decisions of the war, looms up into bold relief, on a question of vital importance."[51]

Just as Republican papers attacked *Milligan*, Democratic papers praised it. The *National Intelligencer*, which often represented the views of the Johnson administration, attacked the Court's critics: "[A]s in war times, these monopolists of patriotism denounced those who upheld the sacred liberties of the citizen as guaranteed by the Constitution, so now in the midst of peace, they assail those who maintain the rights of the States as guaranteed by that same instrument." Democrats in Congress similarly interpreted *Milligan* as requiring a quick readmission of the Southern states to the Union and decried the Republican

vitriol hurled at the Court. Aaron Harding criticized the Republicans for their "attempt to ridicule and contempt the last refuge of liberty [that is, the Supreme Court] for the oppressed."[52] Michael Kerr went further, accusing the Republicans in Congress of attempting to "govern the country without the aid of the unrepresented States, the Constitution, or the Supreme Court."[53] President Johnson did the Court no favors when, on the anniversary of the Battle of New Orleans, he toasted the Supreme Court before a Democratic party dinner as "the great conservative power of the government; never more needed or better appreciated than now." His annual message to Congress, delivered in December 1866, had asked for the immediate readmission of the Southern states because they had met his condition of adopting the Thirteenth Amendment. The new Republican majorities ignored him. Now Johnson and his Democrat allies sought to project the image that the Court was on their side.

The possibility that the Court would throw its weight behind Johnson worried congressional Republicans. They nonetheless proceeded with their plans for Reconstruction and, on March 2, 1867, enacted a Reconstruction Act that required the adoption of black suffrage, new constitutions adopted by majority vote, and ratification of the Fourteenth Amendment before the Southern states would regain their representation in Congress. To guarantee the equal rights of the freedman, Congress created five military districts in the former Confederacy to provide military protection. The army would have the duty to protect all persons; to suppress insurrections, disorder, and violence; and to punish those who disturbed the peace. A supplementary Act gave the military commanders the authority to remove state officers who impeded Reconstruction. Johnson vetoed the Act and in his message argued that with the surrender of the Confederacy, the war powers of the government had ended and the Southern states had resumed their place in the constitutional structure. He also claimed that military occupation of the South violated *Milligan*. Congress overrode Johnson's veto on the very same day by far more than the two-thirds majorities required: 135 to 48 in the House and 38 to 10 in the Senate.

Enforcement of the Reconstruction Act produced the first demonstration of *Milligan*'s desuetude, as military commissions continued in the South. From the end of the war until January 1, 1869, the Union army conducted 1,435 military trials, although the number of such trials steadily declined throughout this period.[54] Some of them involved cases from the war, some from Reconstruction; some were of Southern civilians, some were of Union soldiers. The Reconstruction Act allowed military commanders to use commissions to try civilians when the civilian courts were thought to be inadequate. Military governors became embroiled in reviewing state enforcement of the laws governing everyday life. They suspended various laws, such as debt collection, that were being enforced in a discriminatory manner by state officials and substituted military enforcement when state authorities applied criminal and civil laws unjustly. This state of affairs did not end until all of the Southern states rejoined the Union.[55] Some lower federal courts relied upon *Milligan* to stop these military commission trials, but the record shows that they were unsuccessful in preventing their widespread use in the South.[56]

In the first year of Reconstruction, the Supreme Court studiously refused to entertain cases by states such as Mississippi and Georgia challenging the constitutionality of military government in the South. One might say that Congress had even sought the cooperation of the other two branches in Reconstruction: The reliance on military governors recognized President Johnson's paramount role, and Congress had actually expanded habeas jurisdiction in a February 1867 law designed to allow freedmen to seek the protection of the federal courts.[57] But that changed with the case of *Ex parte McCardle*. Colonel William

McCardle, the editor of the *Vicksburg Times*, vituperatively attacked Reconstruction. In one editorial, he called the military governors "each and all infamous, cowardly, and abandoned villains," and in others he called for resistance to the military, Southern government by whites only, and opposition to the Fourteenth Amendment. Union officers arrested McCardle on November 8, 1867, and brought him before a military commission to face trial for inciting insurrection, disorder, and violence and impeding Reconstruction. When the federal district court denied McCardle's petition for a writ of habeas corpus, he appealed to the Supreme Court under the new 1867 habeas law.

When the Supreme Court announced that it would hear *Ex parte McCardle* in January 1868, it was apparent that a test of the constitutionality of the Reconstruction Act was on the way. It was no coincidence that McCardle was represented by Milligan's lawyers. The Johnson administration made its views known by refusing to have the Attorney General defend the statute. General Grant arranged for the Army to be represented by Lyman Trumbull and Matthew Carpenter, two Republican Senators who had played important roles in the consideration of the Reconstruction Amendments to the Constitution.[58] To illustrate the depths to which the Court had become embroiled in the fight over Reconstruction, one of the days of oral argument was interrupted when Chief Justice Chase had to leave to preside over the organization of President Johnson's impeachment trial in the Senate.[59]

Reports from oral argument suggested that the Court was sympathetic to McCardle's argument that the Reconstruction Act violated the precedent set by *Milligan*. Congress responded swiftly. In January and February of 1868, it had considered legislation requiring that six Justices agree before the Court could strike down federal legislation. The House passed the bill, but the Senate could reach no consensus.[60] However, after the end of oral argument in *McCardle*, Congress overrode President Johnson's veto and removed the Supreme Court's appellate jurisdiction over habeas corpus appeals under the 1867 statute. Only after Johnson's acquittal and Grant's election to the presidency did the Court announce in 1869 that it accepted the stripping of its jurisdiction and would not reach the merits of the *McCardle* petition. Thus, *Milligan* became the motivating factor that led to the only clear example of congressional jurisdiction-stripping in the Court's history.[61]

III.

In concluding, it is worth putting forth some hypotheses about why the Court's decisions in *Merryman* and *Milligan* sparked such amazing reactions from the political branches. In *Merryman*, Chief Justice Taney issued a writ to President Lincoln, who refused to follow it. It is probably the only unambiguous example of a President of the United States refusing to obey an order of the federal judiciary. Despite the praise for *Milligan* in later years, it prompted Congress to strip the Court of jurisdiction. Along with the Jeffersonian impeachment of Justice Samuel Chase and President Franklin Roosevelt's Court-packing plan, these Civil War episodes remain among the most direct challenges to the Supreme Court's authority by the elected branches of government.

Most of the blame surely lies with the Justices themselves. In *Milligan*, the majority could have resolved the case on the narrow statutory ground that the Habeas Corpus Act required release, an outcome that would probably have received the approval of a unanimous Court. Instead, Justice Davis's majority stretched to address a constitutional question with obvious implications for the great struggle between President Johnson and the Reconstruction Congress. The Court may have believed that it was helping to settle the matter, but it only contributed to the political instability and constitutional conflict over the occupation of the South. Its views did not prevail, as military government continued over

the former states of the Confederacy until the Compromise of 1877 removed Union troops in exchange for finding Republican Rutherford Hayes the winner of the 1876 presidential election. The Court would have been better served by following the doctrine of judicial restraint, best expressed by Justice Brandeis in *Ashwander v. TVA*,[62] to interpret statutory questions to avoid constitutional questions. Deciding *Milligan* only on the application of the Habeas Corpus Act would have kept the Court out of a constitutional confrontation between the political branches that it could not settle.

Merryman tells a different story. Like Davis, Chief Justice Taney sought to insert the federal courts into the great constitutional controversy of the day. Taney, of course, had a history of overreaching. He had wanted to settle the question of slavery in the territories in *Dred Scott*, but instead only accelerated the movement toward Civil War. Unlike *Milligan*, however, *Merryman* presented no obvious statutory or jurisdictional means to evade the constitutional question of whether the President could suspend habeas corpus during a period of rebellion without the consent of Congress. Merryman was an American citizen held by the executive branch without criminal charge; he had a right to appeal to a federal court to require the government to explain the legal basis for his detention. Taney's mistake was that he gave Lincoln no time to organize the federal government's response to the unprecedented challenge of secession. The Civil War was a calamity unlike any that the nation had faced before or has faced since. Taney deliberately sought out a constitutional confrontation with the executive branch during the chaotic circumstances of the first weeks of the war, when the very security of the capital city was at stake. It would have been understandable and reasonable if Taney had given President Lincoln the benefit of the doubt and allowed the military time to restore the security of the Baltimore–Washington, D.C. area before pressing forward with *Merryman*. Taney, however, believed that the Supreme Court had a final and immediate authority to resolve the constitutional question of habeas suspension, regardless of the circumstances.

Despite their different settings, both *Merryman* and *Milligan* have that in common. The terrible divisions of the Civil War, and the Taney Court's role in hastening its coming, had not yet weaned the Justices from their attachment to judicial supremacy. *Merryman* and *Milligan* displayed a remarkable lack of deference to the political branches during wartime. War is the area where the structural advantages of the President and Congress are at their height, and where the courts have the least competence.[63] War involves unpredictability and uncertainty, unforeseen circumstances, difficult tradeoffs between competing values, and—in a civil war—the highest of stakes. While some believe that the courts should still decide cases challenging government authority without taking account of wartime conditions, this approach ignores the costs of judicial intervention, not only to the war effort but to the Court. *Merryman* and *Milligan* reveal the wages of judicial supremacy, not just for the President and Congress, but for the institution of the Supreme Court as well.

ENDNOTES

*The author thanks Janet Galeria and Ben Petersen for outstanding research assistance. An earlier version of this essay was delivered as part of the 2008 Leon Silverman lecture series; I am grateful to the Supreme Court Historical Society for extending an invitation to take part in the series.

[1] 17 F. Cas. 144 (C.C.D.Md. 1861) (No. 9487).

[2] 71 U.S. 2 (1866).

[3] 74 U.S. (7 Wall.) 506 (1869).

[4] 5 U.S. 137 (1803); 17 U.S. 316 (1819); 347 U.S. 483 (1954).

[5] These facts are described in *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D.Md. 1861) (No. 9487). No good history focuses on John Merryman and the history of the case, aside from a helpful essay. See Arthur T. Downey, "The Conflict between the Chief Justice and the Chief Executive: *Ex parte Merryman*," 31 *J. S. Ct. Hist.* 262 (2006). There is a useful essay on *Milligan*, Curtis A. Bradley, "The Story of *Ex parte Milligan*: Military Trials,

Enemy Combatants, and Congressional Authorization," in Christopher H. Schroeder & Curtis A. Bradley eds., **Presidential Power Stories** 93 (2008), and a description in James F. Simon, **Lincoln and Chief Justice Taney** 184–98 (2006). The cases receive attention in Daniel Farber, **Lincoln's Constitution** (2003), and J.G. Randall, **Constitutional Problems under Lincoln** (1964). On the experience of Maryland at the outbreak of the Civil War, see Dean Sprague, **Freedom under Lincoln** 1–44 (1965); and Charles B. Clark, "Baltimore and the Attack on the Sixth Massachusetts Regiment," April 19, 1861, 56 *Maryland Historical Magazine* 39 (1961).

[6]*Merryman*, 17 F. Cas. at 152.

[7]*Id.* at 146.

[8]*Milligan*, 71 U.S. at 76.

[9]*Id.* at 80.

[10]For the most penetrating recent work, see Michael Stokes Paulsen, "The Most Dangerous Branch: Executive Power to Say What the Law Is," 83 *Geo. L. J.* 217 (1994); Michael Stokes Paulsen, "The *Merryman* Power and the Dilemma of Autonomous Executive Branch Interpretation," 15 *Cardozo L. Rev.* 81 (1993).

[11]Mark Neely, **The Fate of Liberty: Abraham Lincoln and Civil Liberties** 160–84 (1991).

[12]*Id.* at 181.

[13]David Danelski, "The Saboteurs' Case," 1 *J. S. Ct. Hist.* 61 (1996).

[14]317 U.S. 1, 45 (1942).

[15]323 U.S. 214 (1944).

[16]542 U.S. 507 (2004).

[17]548 U.S. 557 (2006).

[18]Proclamation Calling Militia and Convening Congress, Apr. 15, 1861 in 4 **Collected Works of Abraham Lincoln** 331 (Roy P. Basler ed. 1953).

[19]David Donald, **Lincoln** 297 (1996).

[20]Reply to Baltimore Committee, Apr. 22, 1861, in 4 **Works of Lincoln**, *supra* note 18, at 341.

[21]Abraham Lincoln to Winfield Scott, Apr. 25, 1861, in 4 *id.* at 344.

[22]Abraham Lincoln to Winfield Scott, Apr. 27, 1861, in 4 *id.* at 347.

[23]1 **The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies**, 2d Series, 567–68 (Robert N. Scott ed. 1886).

[24]Mark Neely, **The Fate of Liberty: Civil Liberties under Lincoln** 9 (1992).

[25]Proclamation Suspending Writ of Habeas Corpus in Florida, May 10, 1861, in 4 **Works of Lincoln**, *supra* note 18, at 364–65.

[26]1 Official Records, 2d Series, *supra* note 23, at 574–77.

[27]Carl Swisher, **The Taney Period**, 1836–64, 5 **Oliver Wendell Devise History of the Supreme Court of the United States** 845 (1974).

[28]60 U.S. 393 (1857).

[29]Quoted in *Ex parte Merryman*, 17 F. Cas. 144, 146 (C.C.D.Md. 1861) (No. 9487).

[30]Lincoln, First Inaugural Address, Mar. 4, 1861, in 4 **Works of Lincoln**, *supra* note 18, at 262.

[31]Quoted in 3 Charles Warren, **The Supreme Court in United States History** 91–93 (1922).

[32]Message to Congress in Special Session, July 4, 1861, in 4 **Works of Lincoln**, *supra* note 18, at 421.

[33]Act of Aug. 6, 1861, 12 Stat. 326.

[34]Message to Congress in Special Session, July 4, 1861, in 4 **Works of Lincoln**, *supra* note 18, at 421.

[35]10 Op. Att'y Gen. 74 (1861).

[36]Proclamation Suspending the Writ of Habeas Corpus, Sept. 24, 1862, in 5 **Works of Lincoln**, *supra* note 18, at 433. *See* Neely, *supra* note 11, at 51–74.

[37]Neely, *supra* note 24, at 115.

[38]*Id.* at 130.

[39]3 Warren, *supra* note 31, at 96.

[40]For a review of the issues, see Eric Foner, **Reconstruction: America's Unfinished Revolution, 1863–77** 176–280 (1988); Michael Les Benedict, **A Compromise of Principle: Congressional Republicans and Reconstruction, 1863–69** (1974); Harold M. Hyman, **A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution** 282–306 (1973); Herman Belz, **Reconstructing the Union: Theory and Policy during the Civil War** (1969); Arthur Bestor, "The American Civil War as a Constitution Crisis," 69 *Am. Hist. Rev.* 327 (1964).

[41]No good biography exists of Milligan, but there are several helpful articles about him and his case. *See, e.g.*, Darwin Kelley, "Lambdin P. Milligan's Appeal for State's Rights and Constitutional Liberty during the Civil War," 66 *Indiana Magazine of History* 263 (1970); Frank L. Klement, "The Indianapolis Treason Trials and *Ex parte Milligan*," in **American Political Trials** 101 (Michal R. Belknap ed. 1981); Allan Nevins, "The Case of the Copperhead Conspirator," in **Quarrels That Have Shaped the Constitution** 101 (John A. Garraty ed. 1962); Kenneth M. Stampp, "The Milligan Case and the Election of 1864 in Indiana," 31 *Miss. Valley Hist. Rev.* 41 (1944). A short book is Darwin Kelley, **Milligan's Fight against Lincoln** (1973). For a broader examination of political opposition to Lincoln in the Midwest, see Frank L. Klement, **The Copperheads in the Middle West** (1960).

[42]Stampp, *supra* note 39, at 51–52.

[43]Quoted in Klement, "Indianapolis Treason Trials," *supra* note 39, at 101.

[44]*Id.*

[45]Quoted in *id.* at 198–99.

[46]*Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 76 (1866).

[47]*Id.* at 79–80.

[48]*Id.* at 88 (Chase, C.J., concurring).

[49]Cong. Globe 39–2, 251.

[50]Quoted in 3 Warren, *supra* note 31, at 151.

[51] *Id.* at 154.

[52] Cong. Globe 39–2, 624.

[53] *Id.* at 1167.

[54] Neely, *supra* note 24, at 176–77.

[55] *Id.* at 178–79.

[56] 3 Warren, *supra* note 31, at 164–65.

[57] Habeas Corpus Act of 1867, 14 Stat. 385.

[58] Hyman, *supra* note 38, at 504.

[59] Charles Fairman, **Reconstruction and Reunion, 1864–88**, part one, 6 **Oliver Wendell Holmes Devise History of the Supreme Court of the United States** 455 (1971).

[60] Stanley I. Kutler, "*Ex parte McCardle*: Judicial Impotency? The Supreme Court and Reconstruction Reconsidered," 72 *Am. Hist. Rev.* 835, 838 (1967).

[61] For a contrary view, see William W. Van Alstyne, "A Critical Guide to *Ex parte McCardle*," 15 *Ariz. L. Rev.* 229 (1973); Stanley I. Kutler, **Judicial Power and Reconstruction Politics** (1968).

[62] 297 U.S. 288, 347 (1936) (Brandeis, J, concurring).

[63] My views on the separation of powers in wartime can be found in John Yoo, **The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11** (2005).

Swift and *Erie*: The Trials of an Ephemeral Landmark Case

TONY A. FREYER*

Like jazz improvisation, the meaning of *Swift v. Tyson* was elusive.[1] Justice Joseph Story's 1842 opinion concerning an important commercial-law issue arose from a jury trial.[2] When the creditor plaintiff appealed, counsel for the winning debtor raised as a defense Section 34 of the 1789 Judiciary Act. The federal circuit court disagreed about the standing of commercial law under Section 34. Although profound conflicts otherwise divided nationalist and states'-rights proponents, the Supreme Court endorsed Story's commercial-law opinion unanimously.[3] New members of the Court and the increasing number of federal lower-court judges steadily transformed the *Swift* doctrine; after the Civil War it agitated the federal judiciary, elite lawyers, and Congress.[4] Asserting contrary tenets of American constitutionalism, the Supreme Court overturned the ninety-six-year-old precedent in *Erie Railroad v. Tompkins* (1938).[5] The *Swift* doctrine's resonance with changing times was forgotten. The Court and the legal profession established, transformed, and abandoned the doctrine though an adversarial process and judicial instrumentalism. Although the policy of each decision reflected its time, Story's opinion was more consistent with the federalism of the early Constitution than was *Erie*.[6]

I. A Trial of Commercial Principles

During early 1838, federal judge Samuel R. Betts and a jury in the U.S. Southern District Court of New York heard creditor Joseph Swift's case. The undisputed facts were that Jarius Keith and Nathaniel Norton of Maine drew a bill of exchange that was accepted by George W. Tyson of New York. Tyson accepted the bill in partial payment for a second installment due on some land in Maine. Norton endorsed the bill to Swift, cashier of a Portland, Maine bank, in payment of a previous—or preexisting—debt owed to one G. C. Child. Upon Tyson's refusal to cover the bill, Swift sued. But there were two impediments to his recovery. The unsettled nature of the New York local law regarding bills received in payment of preexisting debts was the first. An apparent fraud surrounding the original drawing of the bill by Keith and Norton was the other. Tyson and other New York City investors knowingly

At issue in the *Swift v. Tyson* case were bills of exchange received in payment for preexisting debts. George W. Tyson of New York had accepted a bill in partial payment for a second installment due on some land in Maine (pictured). When that bill was endorsed to Joseph Swift, a cashier in a Portland, Maine bank, in payment of a previous—or preexisting—debt owed to another creditor, Tyson refused to cover the bill. Swift sued.

entered into what they understood to be a speculative Maine land scheme. Pretrial discovery revealed strong evidence, however, that Keith and Norton did not own the land for which Tysen and the others had contracted to purchase and for which they had accepted the several bills of exchange. Given these facts, could Swift recover from Tyson?[7]

The lawyers for each side and Judge Betts addressed these facts in terms of contrary commercial-law principles. The trial record showed that Swift's bill of exchange arose from complex speculative credit transactions carried on, said one witness, "very loosely."[8] Thomas Fessenden of Maine argued that as a holder of a bill received in payment of a preexisting debt, Swift possessed an absolute bona fide right of recovery. Alexander Hope Dana's defense of Tyson rejected this commercial-law principle for an older commercial-contract rule.[9] In line with Dana's argument, Betts "charged" the jury that "if it was proved that the plaintiff received the Bill of Exchange of Norton in *satisfaction* or *security* of a precedent debt due him by Norton, then the defendant [Tyson] was entitled to the same defenses . . . as if the suit was between the original parties to the bill." The jury thus had to decide whether Keith and Norton held the land in some sort of trust for Tyson and his fellow speculating investors or whether, instead, the two had defrauded the New Yorkers through false representation of ownership. Despite Fessenden's objections to Judge Betts' charges, the record declared, the jury "found a verdict for the defendant."[10]

Like Fessenden's and Dana's arguments, Betts' jury instructions were noteworthy for what they said and merely assumed. According to Fessenden, the central issue in the case was whether Swift's bill of exchange received in payment of a preexisting debt qualified him to be a bona fide holder in due course. Judicial innovator Lord Mansfield incorporated into English law the commercial principle that third-party holders of bills for

preexisting debts qualified for recovery in cases like Swift's.[11] Dana argued and Betts accepted, however, the older commercial-contract principle *Hunt's Merchants' Magazine* stated in September 1839: that "if negotiable securities [such as Swift's bill] are taken merely on account of an antecedent debt, or as a collateral security for such a debt, the receiver does not become a bona-fide purchaser."[12] Regarding this issue of preexisting debt, many states, such as commercially prominent New York, included both the Mansfield principle and the older doctrine in their local law. Other states, such as Maine and Connecticut, accepted the Mansfield principle alone, as did leading commentators such as New York Chancellor James Kent. Betts, the two lawyers, and *Hunt's* nonetheless assumed the existence of these principles without reference to any particular source outside themselves.[13]

This idea that the legal profession could know commercial principles as autonomous entities was puzzling. The "mercantile law is founded in principles which are simple in themselves ... but in their application to the business of life, the details of cases vary so much ... that the most distressing uncertainty hangs over the subject," a *Hunt's* article declared in 1839. Thus, commercial litigation steadily increased. Indeed, the "uncertainty" resulting from applying "simple" commercial principles to particular cases was reflected in New York case law accepting both the Mansfield principle of preexisting debts and its rejection. Given the imagery of "uncertainty," why were Fessenden, Dana, and Betts noncommittal regarding the source of commercial principles pertaining to bills received in payment for preexisting debts? Were all three merely drawing upon the conflicting New York principles? If so, would not the record have shown at least some attempt to distinguish for the jury's consideration why one New York precedent regarding Swift's and Tyson's obligations under the bill of exchange was preferable to another?[14]

Practicalities suggested partial answers to these questions. During this period throughout the Union, the public press often noted that case reports for state appellate courts proliferated. Consequently, leading commentators such as Kent urged that strict regard for precedent was unsuited to America. In Britain, by contrast, a few leading judges and prominent lawyers agreed to limit the number of official case reports, thereby promoting adherence to *stare decisis*.[15] Regarding commercial principles, moreover, American commentators such as *Hunt's* asserted that precedent was often "grounded upon principles of universal equity." Judges should "extract from those precedents ... ethical principles ... and clearly ... point them out in ... opinions."[16] Kent's *Commentaries on American Law* affirmed further "that the records of many courts in this country are replete with hasty and crude decisions" and that "[e]ven a series of decisions are not always conclusive evidence of what is law." Ultimately, Kent declared, "the revision of a decision very often resolves itself into a mere question of expediency." Also, in most commercial cases, lower federal-court and Supreme Court decisions were "not binding on states' courts, nor those of the state courts on them."[17]

These mercantile and legal commentaries suggest Fessenden's, Dana's and Betts' shared perception of commercial principles. Conflicting New York precedents were unreliable guides to adjudicating commercial practices involving speculative credit derived from preexisting debts. Still, in Swift's suit the two lawyers and the judge assumed that either the Mansfield or older commercial-contract principles governed the case. In addition, Kent and *Hunt's* concluded that state or federal court's commercial decisions were only "evidence" of "universal ethical" principles common among merchants.[18] Nevertheless, the American legal profession and merchants knew these principles only as part of the corpus of all English and state court decisions digested in official state and federal reports, legal treatises such as Kent's *Commentaries,* and merchant journals

such as *Hunt's*. In the most prosaic sense, these printed sources defined business peoples' ordinary commercial practices distilled from numerous American and English court decisions. Thus, the texts themselves constituted a conflicted corpus of commercial principles from which Betts drew his jury instructions.[19]

In winter 1839, Fessenden appealed Betts' jury instructions. Fessenden, Dana, and Betts reasoned from "uncertain" commercial credit principles in order to settle the obligations arising from Swift's preexisting debt.[20] These principles in turn defined the scope of mercantile credit speculation prevailing during the panic-depression period from 1837 to 1843.[21] Even so, legal and commercial texts familiar to lawyers, judges, and merchants constituted an imagined mercantile marketplace engendering legal disputes the courts adjudicated. Kent stated that in such cases, what often shaped the judge's choice of a legal rule was "expediency." Although Kent clearly was aware of William Blackstone's declarative natural-law theory, his emphasis upon expediency reflected an understanding of English legal positivism.[22] On this point, William Sampson, Irish émigré lawyer-critic of the common law, was more pointed: "So long as the struggle between precedent and reason shall continue legal opinions ... will depend more on the character and turn of mind of the judge, who is to decide it, than any general principle." Fessenden's appeal of *Swift* encountered such a judge in Joseph Story.[23]

II. What Justice Story and the Supreme Court Decided in *Swift*

In order to reach the Supreme Court, Dana first appealed to the U.S. Circuit Court for the Southern District of New York. There, Supreme Court Justice Smith Thompson joined Betts. Unlikely to change Betts' mind, Fessenden counted on persuading Thompson that Swift's case warranted following the Mansfield commercial principle. Bad economic conditions and unsettled legal doctrines undoubtedly encouraged Fessenden's hope that Thompson would disagree with Betts. Such disagreements were appealed to the Supreme Court through a procedure known as "certificate of division."[24] The Court's response affirmed Fessenden's hopes. As Dana and Fessenden argued the complex facts, a new issue "arose" concerning Section 34 of the 1787 Judiciary Act.[25] It read: "[T]he laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."[26] The Supreme Court reviewed this issue in 1840, with Daniel Webster arguing Swift's side. Chief Justice Roger B. Taney sent the issue back to the circuit court for further clarification; the Supreme Court handed down its decision in January 1842.[27]

Were the central issues in *Swift* solely the construction of Section 34 and what commercial credit principles should be enforced during the depression?[28] Hypothetically, the case could have raised constitutional federal–state questions involving slavery. In early 1841, a divided Court had decided *Groves v. Slaughter*, expanding the states' control over the interstate slave trade and limiting the federal commerce power. Moreover, in January 1842 the Court decided both *Swift* and *Prigg v. Pennsylvania*.[29] In the latter case, the Court split over Story's holding enabling Pennsylvania's nonacquiescence to enforcement of the federal fugitive-slave law. These explosive slavery issues ensured that if constitutional federal-state issues were at stake in *Swift,* heated contention and dissent would have emerged within the Court. Conversely, the absence of constitutional contention or dissent in the Court's decision of *Swift* suggested that establishing principles governing credit obligations under bills of exchange litigated in federal court was indeed paramount.[30]

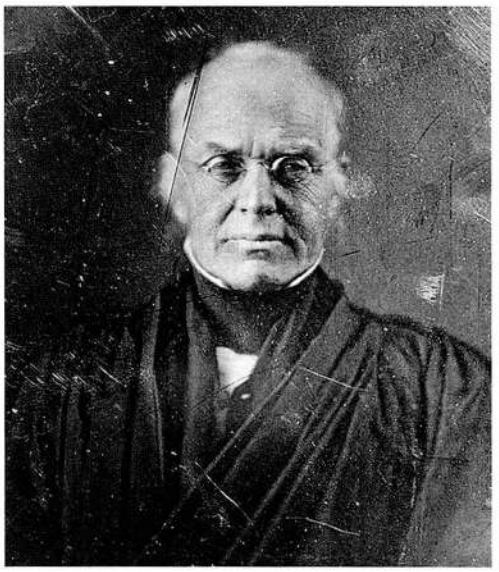
Clearly, slavery and other state–federal constitutional issues splintered the Court,

whereas vital but comparatively mundane commercial questions such as those appealed in *Swift* usually did not. In *Groves*, only Justice James M. Wayne formally joined Thompson's majority opinion; Taney, Justice John McLean, and Henry Baldwin concurred solely in the result, while Justice John McKinley and Story dissented.[31] McLean was the lone dissenter to Story's full *Prigg* opinion; only Wayne supported it completely, while Taney, Thompson, Baldwin, and Virginian Peter V. Daniel dissented in part.[32] Also, from 1841 to 1860 Daniel was the Court's most absolute states'-rights proponent. Daniel consistently maintained this rigid states'-rights position not only regarding slavery, but also in cases involving admiralty jurisdiction and regulation of state-chartered corporations.[33] Since the 1790s, by contrast, the Supreme Court had regarded bills of exchange such as that protested in *Swift* as presenting rather prosaic issues arising under federal diversity jurisdiction. States'-rights proponents such as St. George Tucker and Able Upshur agreed.[34] Even so, the Court's handling of these commercial-law issues relied, Justice John Catron suggested in another context, "more on common sense than any deep knowledge."[35]

These commercial principles also indirectly guided the construction of Section 34. As Francis Hilliard's layman's law book stated in 1835, "*the custom of merchants*, or *the law merchant*, which, however is nothing but a branch of general law of the land" governed bills of exchange.[36] From the 1790s onward, whether or not Section 34 was directly at issue, federal courts consistently recognized a distinction between this general commercial law and local statues or customs constituting real estate or immovable property rights.[37] New York's confused commercial cases defining Swift's versus Tyson's recovery under the disputed bill attested to the uncertainty permeating many states' commercial-law principles.[38] On his Ohio circuit in 1841, Justice McLean articulated these distinctions in a case with facts and issues closely matching those in *Swift*. Consistent with Section 34, the federal courts followed a state supreme court's construction of a local statute or customary law insofar "as it constitutes a rule of property," McLean declared. In the present case, however, since the bill of exchange presented a "question . . . not local but of a general interest, the decision in Ohio does not constitute the rule for this court," which he held, "must be considered as resting on general principles."[39]

Justice Story's opinion for a unanimous Court in *Swift* reflected this case law and the mercantile-legal commentary discussed above. Dana introduced Section 34 in an attempt to convince members of the Supreme Court that they should follow one strand of confused New York precedents. The narrow question was whether those "uncertain" precedents denying recovery to holders of bills received in payment of preexisting debts constituted "laws" under Section 34.[40] "In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws," Story declared. "They are, at most only evidence of what the laws are, and are not themselves laws." Dana's argument conceded, Story observed, that the New York cases were merely deduced from "general principles" of commercial law. As had McLean and other federal judges, Story then construed Section 34 to be "limited in its application to state laws strictly local; that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character."[41]

In questions concerning general commercial law, both federal and state judges exercised their own discretion. "It was never supposed by us," Story said, "that [Section 34] did apply . . . to questions of a more general nature, not at all dependent upon local statutes, or local usages of a fixed and permanent operation, as . . . to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law." In



In his opinion favoring Swift, Justice Joseph Story (pictured) wrote that collateral securities expanded long-term credit investments. Indeed, he declared, "probably more than half of all bank transactions in our country ... are of this nature. The [contrary] doctrine would strike a fatal blow at all discounts of negotiable securities for preexisting debts."

commercial cases, state and federal judges exercised independent discretion, the decisions of one not binding on the other. Story added Lord Mansfield's dictum that bills of exchange and other negotiable commercial contracts were governed by the general commercial law. He also cited decisions upholding the same principles from Chief Justice John Marshall's era. "And we have not now the slightest difficulty in holding," Story concluded, that the "true intendment and construction" of Section 34 "is strictly limited to local statutes and usages" and "does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence."[42]

While Swift finally won, Story's opinion displayed innovation towards the preexisting debt issue that Catron questioned. The Court agreed unanimously with Story's construction of Section 34, which in turned reversed Betts' jury instructions from opposing to embracing the validity of preexisting debts. In line with English cases he cited, Story extended his decision to include commercial contracts drawn and received as a "collateral security" for bona fide credit transactions. Neither the final arguments nor the original record of the case raised the status of collateral securities.[43] Nevertheless, Story emphasized, collateral securities expanded long-term credit investments. Indeed, he declared, "probably more than half of all bank transactions in our country ... are of this nature. The [contrary] doctrine would strike a fatal blow at all discounts of negotiable securities for preexisting debts."[44] Catron wrote a concurring opinion objecting to Story's gratuitous introduction of this dictum into the Court's decision. He preferred to let the issue rest until it formally arose before the Court. The objection did not affect the unanimous holding favoring Swift.[45]

III. The Transformation of the *Swift* Doctrine

During the 1840s, the commercial-law meaning of the *Swift* doctrine was clear. Shortly after the Court announced its decision, a newspaper noted that the opinion "settled an important commercial question which ought to be soon known."[46] A law journal echoed the newspaper's statement, as did Story's own use of the decision in a Harvard Law School moot court.[47] Catron wrote James Buchanan in August 1842, observing that Story was "trembling alive" to the impression the Court's commercial opinions had in England.[48] Also in 1842, Story wrote another unanimous opinion for the Supreme Court, holding that the "general commercial law" governed obligations under insurance contracts. In these commercial cases, consideration of state law under Section 34 was unnecessary.[49] In the same

year, the Ohio supreme court reversed an earlier commercial-contract decision in order to follow the commercial-law principle decided in *Swift*. By 1849, the supreme courts of Alabama, Michigan, North Carolina, and New Jersey had followed Ohio's lead.[50] New York courts expressly rejected those principles, however, even though Kent praised Story's opinion as establishing the "plainer and better doctrine."[51]

Before the Civil War, the commercial-law meaning of the *Swift* doctrine remained widely understood. J. I. C. Hare's and H. B. Wallace's various editions of **American Leading Cases** listed Story's opinion as a "leading" commercial-law case. *Hunt's* review of commercial cases in 1847 accepted the same principle. Theophilus Parsons, who became Harvard Law School's professor of commercial law following Story's death in 1845, cited *Swift* in several works as a prominent commercial-law precedent.[52] Thus prior to the 1860s, legal and commercial commentary and state and federal judges understood that the *Swift* doctrine rested on commercial-law principles. Technically, Section 34 had a bearing on this "general commercial law" in its language referring to law existing among and "applied" from the "several" states.[53] Still, lawyers and judges understood this commercial law to be evidence of practical principles derived from concrete business experience prevailing throughout the mercantile world. Moreover, the legal profession distinguished these practical principles from state statutes and long-established local customs pertaining to real property that federal courts followed as rules of decisions under Section 34.[54]

Notwithstanding this widely accepted meaning, the *Swift* doctrine soon revealed a protean quality. In 1845, Justice McLean's majority opinion in *Lane v. Vick* held that where no state statute was involved, the Mississippi supreme court's "mere construction of a will" did not "constitute a rule of decision" binding upon U.S. courts. Although McLean cited *Swift*, clearly his opinion expanded the scope of "general commercial law" beyond Story's meaning.[55] Partly for this reason, Justice McKinley dissented, joined by Taney. McKinley acknowledged that the purpose of federal-court jurisdiction was to give parties "a tribunal, presumed to be free from any accidental state prejudice or partiality." States'-rights and nationalist proponents alike agreed upon this point. Recalling Story's original enunciation of the *Swift* doctrine, however, McKinley affirmed that legal rules governing wills were part of the state's local law binding upon federal courts under Section 34. Despite sporadic dissent from its members by the Civil War, the Court, responding to innovative arguments lawyers advanced on behalf of clients, further expanded the general law and circumscribed Section 34.[56]

The archetypal pro-slavery, states'-rights proponent Justice Daniel indicated the *Swift* doctrine's initial growth. Daniel, of course, voted for Story's 1842 opinion.[57] Until his death in 1860, he supported or dissented from the *Swift* doctrine's expansion depending on the case. Daniel's opinion for a unanimous Court in *Watson v. Tarpley* (1856) demonstrated that, like Story's original doctrine, the doctrine's initial expansion did not directly concern constitutional issues of federal-state relations. Employing diversity jurisdiction, a Tennessee resident sued a Mississippian for recovery on a bill of exchange drawn in New Orleans. The defendant relied on a state statute favoring Mississippi debtors. Citing Story's construction of Section 34 in *Swift* as authority, however, Daniel declared that the general commercial law was neither bound by "local limits" nor confined in its administration to a "particular jurisdiction." Moreover, a state statute that either subverted rights under the commercial law or impaired federal power was "without authority and inoperative" in federal court. Indeed, any state law having that effect was, Daniel held, "a violation of the general commercial law, which a state would have no power to impose and which the courts of the United States would be bound to disregard."[58]

If constitutional issues were not at stake, what motivated justices like Daniel to expand the *Swift* doctrine? At one level, Daniel and his colleagues merely decided between contrary arguments lawyers raised in federal diversity jurisdiction on behalf of their interstate commercial clients. In such instrumental terms, Daniel's unanimous *Watson* opinion simply followed Story's holding in *Swift* favoring entrepreneurial uses of commercial credit instruments.[59] Yet Story had held that under Section 34, state statutes bound federal judges. Daniel announced, however, that a state statute or other local law did not bind federal courts if it violated commercial principles that diversity jurisdiction was intended to protect. A subtle shift had occurred. Story's original conception assumed that mercantile practices reflected in commercial principles permeated the common law of the "several" states and Britain. Judges were free to "apply" or ignore these principles. Daniel's conception, by contrast, linked a "general commercial law" to the constitutional purposes of diversity jurisdiction. This new conception did not invalidate local law. Instead, it attempted to balance the authority of federal judges to protect nonresidents with the idea that local and federal law operated in separate yet coexisting spheres.[60]

Expanding upon this conceptual shift, the Court gradually transformed the *Swift* doctrine. Daniel often reaffirmed his presumption in *Swift* that the general commercial law involved no constitutional federal–state issues such as those raised in *Prigg,* the fugitive-slave case of 1842.[61] By 1856, Daniel's *Watson* opinion nonetheless established the theoretical linkage between diversity jurisdiction and the general commercial law. This linkage in turn converged with the Court's deployment of the Due Process Clause to defend slavery in the infamous *Dred Scott* case.[62] The constitutional ramifications of the general law increased during the Civil War. In *Chicago v. Robbins* the Court incorporated a tort negligence doctrine into the general law. Reversing a lower-court decision following Illinois law, the Court imposed liability on a New York property owner for a Chicago construction-site accident.[63] The Court's decision in *Gelpcke v. Dubuque* was more controversial. An 8–1 majority infused the *Swift* doctrine with constitutional authority to nullify the Iowa supreme court's construction of the state's constitution, which repudiated foreign bondholders' contract rights. The *Swift* doctrine was now the basis for a federal common law possessing constitutional force.[64]

IV. The Origins of *Erie Railroad v. Tompkins*

The reconstituted *Swift* doctrine incurred mounting denunciation. Before the Civil War, legal and mercantile commentary and the Supreme Court's changing membership endorsed the commercial-law focus of Story's original opinion. Dissenters questioned the opinion's limits, but not its essential validity.[65] By the 1870s, however, public commentators, legal academics, and many lawyers and judges excoriated the federal common law as a shifting Court majority evolved in railroad tort accident cases. The Court's deployment of *Gelpcke* to protect bondholders in some 300 cases also aroused vociferous attacks.[66] A federal law of 1875 extending diversity jurisdiction to its fullest constitutional limit accelerated resort to the reconstituted *Swift* doctrine. Employing this process, corporations and foreign investors increasingly removed cases from state to federal court in a practice known as forum-shopping. Repeated efforts within and without Congress to eradicate forum-shopping and the transformed *Swift* doctrine generally were unsuccessful. Despite cacophonous criticism and searching jurisprudential reassessment, the doctrine grew.[67]

Why did this expansion persist until the 1930s? A practical answer involved the changing market for legal services. From the Civil War to the Great Depression, large manufacturing corporations dominating wage workers

The *Swift* doctrine came increasingly under fire as the country moved away from small merchant and farming businesses to large-scale manufacturing.

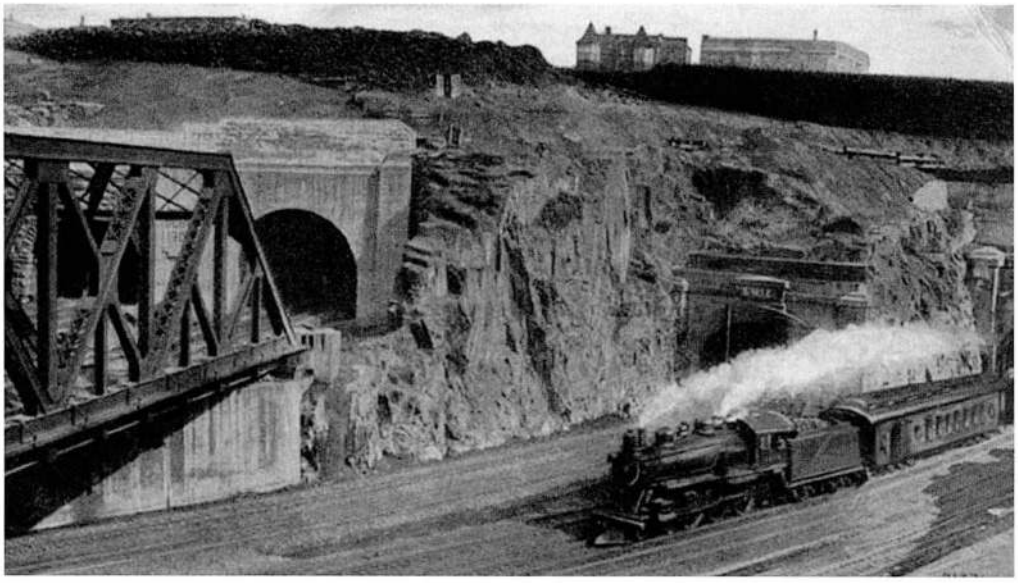
and consumers displaced the producers' economy of farmers and merchants.[68] Meanwhile, the legal profession underwent increasing specialization, splitting into corporate defense versus plaintiffs' lawyers. Initially, corporate lawyers controlled forum-shopping and the growing *Swift* doctrine, but by the 1890s the plaintiffs' bar had learned to mitigate the process. Still, corporations clearly benefited most.[69] Indeed, federal circuit judge William Howard Taft announced to the American Bar Association in 1895 that "[t]he capital invested in great enterprise in the South and West is owned in the East and abroad." The big "corporations" investing this capital "all carry their litigation into Federal courts on the ground of diverse citizenship ... and in view of the deep seated prejudice entertained against them by the local population, it is not surprising that they do." In 1928, roughly two years before his death ended his time as Chief Justice of the Supreme Court, Taft reaffirmed these sentiments in a letter to his brother, as he resisted yet another congressional attack upon diversity jurisdiction and the *Swift* doctrine.[70]

Taft's long-term defense of forum-shopping and the *Swift* doctrine reflected a protracted struggle. Since the mid-nineteenth century, new states and population growth had facilitated increased numbers of federal judges. New and existing federal judges readily grasped the discretion the expanded *Swift* doctrine and diversity jurisdiction granted, especially in personal-injury, insurance, and corporate-reorganization litigation.[71] Moreover, though the Judiciary Act of 1891 ended their circuit-riding duties, members of the Supreme Court retained close ties with their federal circuit court colleagues. Thus, even forceful critics of forum-shopping such as Samuel Miller and Stephen Field favored curbing federal judges' independent discretion under the *Swift* doctrine, rather than ending it. Not until the 1930s did a Supreme Court majority favor overturning the doctrine. Meanwhile, divisions among lawyers and lower-court judges undercut support for

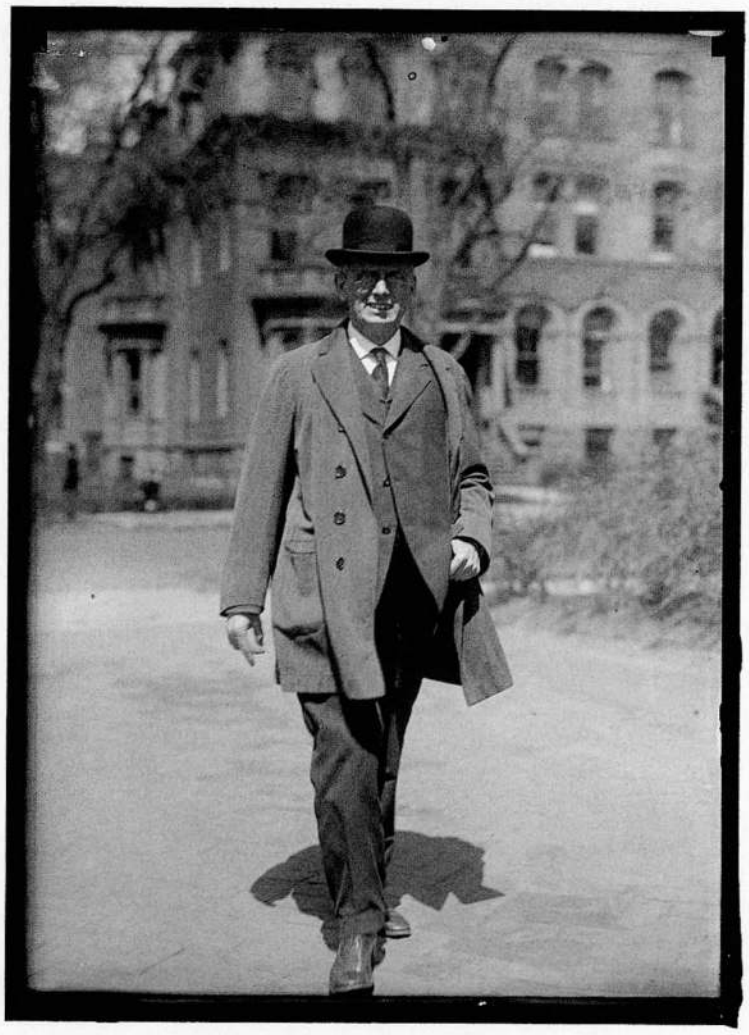
effective congressional legislation from the 1880s through the 1930s.[72] In 1923, Charles Warren revealed an early draft of Section 34 suggesting that congressional inaction had perpetuated an interpretation violating this draft's meaning, but subsequent discoveries of Section 34 original drafts exposed how problematic Warren's assertions were.[73]

Criticisms from reform-minded lawyers and academics were also quite influential. Two points deserve emphasis. First, only after *Gelpcke* and the emergence of a federal common law in accident cases did criticism of the *Swift* doctrine develop a constitutional dimension. It was forgotten that before the Civil War, even rigidly states'-rights advocates such as Daniel had no constitutional issue with Story's general commercial law. Even so, legal commentary—including teaching materials from constitutional-law classes at Harvard University and the University of Pennsylvania—indicated that the *Swift* doctrine as a constitutional problem began with *Gelpcke*.[74] Second, critics bundled the constitutional problem with the legal positivism associated with critiques of natural law. Sometimes, too, proponents of positivism singled out—even blamed—Story as being solely responsible for infusing his *Swift* opinion with Blackstone's declarative natural-law theory. By contrast, Joseph H. Beale, though a leading critic, conceded that Story "mixed" theories of positivism and natural law, accepting an older "erroneous" belief that international mercantile customs pervaded the merchant world.[75]

Opposition to the *Swift* doctrine and laissez-faire constitutionalism eventually converged. Justice Oliver Wendell Holmes' notable dissents characterizing the doctrine as representing a "brooding omnipresence in the sky" reflected a legal-positivist critique he first espoused in 1873.[76] Joining Holmes' dissents was Louis Brandeis, who had resisted *Gelpcke*'s constitutionalization of the doctrine since encountering it as a Harvard law student



Unemployed laborer Harry Tompkins was walking at night along a well-worn path next to the Erie Railroad tracks (pictured) in 1934 when he was struck by an object protruding from one of the cars. He fell down, and his right arm was crushed beneath the wheels of the train. He sued the railroad company in federal district court in New York for personal injury.



Justice Louis Brandeis (pictured) wrote the opinion in *Erie Railroad v. Tompkins* that overturned the long-unpopular *Swift* decision. Justices Pierce Butler and James C. McReynolds dissented, however, objecting that the overturning of the nearly hundred-year-old precedent was unwarranted.

in the 1870s.[77] This longtime rejection of the constitutionalized version of the *Swift* doctrine merged with Holmes' and Brandeis' simultaneous dissent from the conservative laissez-faire constitutionalism identified with Taft and others. The Supreme Court's revolution of 1937 replaced laissez-faire with New Deal liberal constitutionalism.[78]

In 1938, the constitutionalized version of *Swift* suffered the same fate. Removing his case from Pennsylvania to a New York federal court, injured and unemployed laborer Harry Tompkins won a $30,000 damage award against the Erie Railroad. The railroad's appeal to the Supreme Court, however, resulted in Brandeis's opinion overturning both Tompkins' award and the *Swift* doctrine that had made it possible.[79] For a 6–2 majority Brandeis held that the *Swift* doctrine represented an "unconstitutional course" of decisions. Through various drafts, Chief Justice Charles Evans Hughes and Justices Owen J. Roberts, Harlan F. Stone, and Hugo L. Black somewhat modified Brandeis' opinion.[80] Brandeis nonetheless firmly maintained the constitutional core. Based on the original meaning of American federalism, he declared, Section 34 bound federal courts to follow state law in diversity cases

where neither a federal statute nor constitutional provision was at issue. The federal common law derived from *Swift* thus was an "unconstitutional course" of decisions.[81] Stanley Reed's concurring opinion noted that never before had the Court equated a "course" of decision with a constitutional violation; by doing so, he observed, the Court's opinion shrouded the legitimate demise of *Swift* in unnecessary ambiguity. Simply reinterpreting Section 34 would have achieved the necessary outcome without precipitating inevitable confusion.[82] Pierce Butler's dissent, joined by James C. McReynolds, affirmed that the constitutional rationale for overturning ninety-six years of precedent violated tenets of judicial self-restraint that Progressives such as Brandeis, Hughes, and Stone had long advocated.[83]

Conclusion

The *Erie* opinion's problematic constitutional rationale balanced the interests of corporate defense and plaintiffs' lawyers, particularly in interstate personal-injury and insurance cases. Notwithstanding the policy merits of the *Erie* decision, Brandeis' analysis of the original *Swift* doctrine engendered, as Reed predicted, constitutional conflict.[84] Locating the trial and appeal of *Swift* within the context of the panic-depression era from 1837 to 1843 revealed legal and mercantile commentators' basic commercial-law assumptions. Essentially, Catron's "common sense" approach to rights and obligations under bills of exchange prevailed, rather than a natural-law declarative theory.[85] Indeed, the nationalist Kent and states'-rights absolutist Daniel understood the general commercial law in much the same terms. Story's construction of Section 34 reflected a similar approach turned to the instrumental uses of interstate credit relations buffeted by market instability.[86] Eventually, the Uniform Commercial Code adopted Story's commercial-law principle.[87] Thus, constitutional contentiousness was inherent not in Story's opinion itself, but in the transformation later courts and lawyers wrought as a changing market for legal services impelled the construction of an imagined *Swift* doctrine. Ironically, Brandeis' imposition of a constitutional rationale upon Story's commercial-law decision ensured ongoing constitutional controversy.

ENDNOTES

*I am grateful to Kathleen Shurtleff and Jennifer Lowe for facilitating my contribution to the 2008 Leon Silverman Lecture Series. For financial support, I thank University of Alabama School of Law Dean Kenneth C. Randall, the University of Alabama Law School Foundation, and the Edward Brett Randolph Fund.

[1] *Swift v. Tyson*, 16 Peters (41 U.S.) 1 (1842). The literature concerning the *Swift* and *Erie* cases is vast. In this essay, I address the following secondary works as representative of an elusive history: R. Kent Newmeyer, **Supreme Court Justice Joseph Story: Statesman of the Old Republic** (Chapel Hill, NC, 1985), 334–44, 383–85; Herbert Hovenkamp, **Enterprise and American Law 1836–1937** (Cambridge, MA, 1991), 79–92; Gerald T. Dunne, **Justice Joseph Story and the Rise of the Supreme Court**, (New York, 1970), 403–14; Morton J. Horwitz, **The Transformation of American Law 1780–1860** (Cambridge, MA, 1977) 245–52; Austin Allen, **Origins of the *Dred Scott* Case: Jacksonian Jurisprudence and the Supreme Court 1837–1857** (Athens, GA, 2006), 51–58, 62, 66–67, 136, 140, 156–57; Carl B. Swisher, **The Taney Period, 1836–64**, vol. V, **Oliver Wendell Holmes Devise History of the Supreme Court of the United States** (New York, 1974), 320–38; Wilfred J. Ritz, Wythe Holt and L. H. La Rue, eds., **Rewriting the History of the Judiciary Act of 1789: Exposing Myths, Challenging Premises, and Using New Evidence** (Norman, OK, 1990); Tony Freyer, **Harmony & Dissonance: The *Swift* & *Erie* Cases in American Federalism** (New York, 1981); Mark Tushnet, "*Swift v. Tyson* Exhumed," 79 *Yale Law Journal* 284–310 (1969–1970); William R. Casto, "The *Erie* Doctrine and the Structure of Constitutional Revolutions," 62 *Tulane Law Review* 5, 907–62 (May 1988); Edward A. Purcell, Jr., **Brandeis and the Progressive Constitution: *Erie*, The Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America** (New Haven, CT, 2000). Adam Bernstein, "Whitney Balliett: Jazz Reporter Known for Poetic Prose," *Washington Post*, February 2, 2007, B07, suggested the "jazz" allusion.

[2] Despite the large literature about *Swift*, few sources use the trial record of the case. *But see* Tony Allan Freyer, "Unity from Diversity: Commercial Stability and *Swift v. Tyson* (1842)" (history department, PhD dissertation,

Indiana University, 1975); Tony Allan Freyer, **Forums of Order: The Federal Courts and Business in American History** (Greenwich, CT, 1979), 53–98; Freyer, **Harmony & Dissonance**, 1–45.

[3]Freyer, **Harmony & Dissonance**, 1–45; John P. Frank, **Justice Daniel Dissenting: A Biography of Peter V. Daniel, 1784–1860** (Cambridge, MA, 1964), 168–69.

[4]Purcell, **Brandeis**, 11–94; Freyer, **Forums of Order**, 99–141; Freyer, **Harmony & Dissonance**, 45–99.

[5]304 U.S. 64 (1938).

[6]*Compare* Ritz et al., **Rewriting**, 126–99; Charles Warren, "New Light on the Judiciary Act of 1789," 37 *Harvard Law Review* 49–87 (November, 1923); Purcell, **Brandeis**, 342 n.78.

[7]Manuscript record of the case of *Swift v. Tysen* (CCDNY, 1838–42); manuscript record of the equity case X-100 of *Tysen v. Swift* (CCDNY, 1837–40). Both of these manuscripts include numbered, dated, unnumbered, and undated files and affidavits. They were located for the author in the National Archives by officials of the General Archives Division in response to a written request. The author also used the records of the Supreme Court of the United States, #68, *Joseph Swift v. George W. Tysen*, in the United States Court Records and Briefs, part 1, Jan. 1841 to Jan. 1843, vol. 1, 1–14, located at the University of Pennsylvania Law School, from Reel #7 of the microfilm series of Scholarly Resources, Inc. Note that the trial record consistently refers to "Tysen," and the spelling appears as "Tyson" only during the appellate stages of the case.

[8]Thomas Fessenden, "Copy Case," quoted at 20 in the manuscript record of the case of *Swift v. Tysen* (CCDNY, 1838–42).

[9]Equity file X-100, *Tysen v. Swift*, Oct. 26, 1837, 1–12.

[10]Fessenden, "Copy Case," 25–26.

[11]Freyer, **Harmony & Dissonance**, 10, 14, 16, 30, 47.

[12]"Legal Protection of Good Faith," *Hunt's Merchants' Magazine* I (Sept. 1839), 231.

[13]State and federal cases and other contemporary texts discussed in Freyer, **Harmony & Dissonance**, 10–11, 14, 16, 17–43.

[14]*Id*; "Mercantile Law," *Hunt's Merchants' Magazine* I (Jan. 1839), 66.

[15]John P. Dawson, **The Oracles of the Law** (Ann Arbor, MI, 1968), 58–59, 69–72, 77–80, 85–99.

[16]Quoted in Freyer, **Harmony & Dissonance**, 22–23.

[17]James Kent, **Commentaries on American Law** (4 vols. 12th ed., 1873), v. 1, 477; "Common Law," *North American Review* XIX (October 1824), 420.

[18]*Supra* notes 16, 17.

[19]Dawson, **Oracles of the Law**, 85–89; Freyer, **Harmony & Dissonance**, 4–25; Freyer, **Forums of Order**, 1–52.

[20]*Supra* notes 8–10.

[21]Hugh Rockoff, "Banking and Finance, 1789–1914," in Stanley L. Engerman and Robert E. Gallman, eds., **The Cambridge Economic History of the United States**, vol. II, **The Long Nineteenth Century** (3 vols., Cambridge, UK, 2000), 665–67.

[22]*Supra* note 17; Horwitz, **Transformation**, 245–50; Maxwell Bloomfield, **American Lawyers in a Changing Society, 1776–1876** (Cambridge, MA, 1976), 80–86; *but see* Casto, "The *Erie* Doctrine," 62 *Tulane Law Review* 912–923 (May 1988).

[23]William Sampson, "On the Common Law," *North American Review* XIX (October 1824), 427; Bloomfield, **American Lawyers**, 64–83; Hovenkamp, **Enterprise**, 83–89; Newmeyer, **Justice Story**, 334–44, 383–85.

[24]Swisher, **Taney Period**, 327–30; Freyer, **Harmony & Dissonance**, 12–17.

[25]Quoted in Freyer, **Harmony & Dissonance**, 13.

[26]U.S. Statutes at Large, I, 92.

[27]*Supra* note 24.

[28]*Id*; *see also supra* notes 3 and 8–10.

[29]*Groves v. Slaughter*, 15 Peters 449 (1841); *Prigg v. Pennsylvania*, 16 Peters 539 (1842); Paul Finkelman, **An Imperfect Union: Slavery, Federalism, and Comity** (Chapel Hill, NC, 1981), 132–39, 266–71, 325–37; Allen, ***Dred Scott***, 56–58, 62, 66–67, 136; Swisher, **Taney Period**, 528–58.

[30]*Supra* note 3.

[31]Allen, ***Dred Scott***, 65–67, 81, 89.

[32]*Id.*, 83–86; *see also* note 29.

[33]Allen, ***Dred Scott***, 34, 49, 56, 76–77, 88, 156, 163–66, 186; *see also supra* note 3.

[34]Freyer, **Harmony & Dissonance**, 18–19.

[35]Quoted in Swisher, **Taney Period**, 321.

[36]Francis Hilliard, **The Elements of Law** (Boston, 1835), 106 (emphasis in original).

[37]*Brown v. Van Braam*, 3 Dallas 344 (1797), was the first Supreme Court decision directly involving commercial-law issues and Section 34 of the 1798 Judiciary Act. For it and other cases and commercial texts, see Freyer, **Harmony & Dissonance**, 18–33, Freyer, **Forums of Order**, 1–52.

[38]*Supra notes* 8–11, 13.

[39]*Riley v. Anderson*, 20 F. Cas. 802 (C.C.D. Ohio, 1841). The Ohio case was *Riley & Van Amringo v. Johnson*, 8 Ohio 526 (1838).

[40]*Swift v. Tyson*, 16 Peters (41 U.S.) 1, 13, 17, 20 (1842); *supra* notes 9, 24.

[41]16 Peters (41 U.S.) at 17, 18; *supra* notes 8, 10, 39.

[42]16 Peters (41 U.S.) at 19.

[43]*Id.* at 19–22.

[44]*Id.* at 20.

[45]*Id.* at 23–24.

[46]Quoted in Charles Warren, **The Supreme Court in United States History** (3 vols., Boston, 1923), II, 363.

[47]"Bills of Exchange," *Pennsylvania Law Journal* I (1842), 219. The reference to Story's use of *Swift* in class is in Judge Story's Note of Argument in Moot Court, Spring

Term, 1842, located in the Treasure Room, Harvard Law School, Cambridge, Massachusetts. The author is indebted to Miss Edith Henderson for this latter reference.

[48]Quoted in Swisher, **Taney Period**, 329.

[49]*Carpenter v. Providence Washington Insurance* Co., 16 Peters (41 U.S.) 495 (1842).

[50]*Carlise v. Wisehart*, 11 Ohio 191–92 (1842). For other states, see cases cited in Freyer, **Harmony & Dissonance**, 170 n.3.

[51]*Stalker v. McDonald*, 6 Hill 93 (1843); James Kent, **Commentaries on American Law** (4 vols., 6 ed., New York, 1845), III, 80.

[52]J. I. C. Hare and H. B. Wallace, eds., **American Leading Cases**, 2 vols. (2d ed., Philadelphia, 1851), v. 1, 344; Theophilus Parsons, **The Elements of Mercantile Law** (2d. ed., Boston, 1862), 151; Theophilus Parsons, **A Treatise on the Law of Promissory Notes and Bills of Exchange**, 2 vols. (2d. ed., Boston, 1876), I, 221–23, II, 43; Theophilus Parsons, **The Personal and Property Rights of a Citizen of the United States** (Hartford, 1877), 72–73, 641–43.

[53]"Leading Cases Upon Commercial Law," *Hunt's Merchants' Magazine* XVII (November 1847), 504; John William Wallace, **The Want of Uniformity in the Commercial Law between the Different States of Our Union: A Discourse** (Philadelphia, 1851), 32.

[54]*Supra* note 19.

[55]*Lane v. Vick*, 3 Howard 477 (1845).

[56]*Id.* at 481–82. For additional cases, see Freyer, **Harmony & Dissonance**, 47–54.

[57]*Supra* notes 3, 31–33.

[58]*Watson v. Tarpley*, 18 Howard 517, 521 (1856).

[59]Hovenkamp, **Enterprise**, 89–90; Horwitz, **Transformation**, 245–50.

[60]Freyer, **Harmony & Dissonance**, 53–55; *supra* notes 15, 23, 31–33; *but see* Tushnet, "*Swift* Exhumed," 295–96.

[61]*Supra* notes 31–33.

[62]*Dred Scott v. Sandford*, 60 U.S. 393 (1857); Allen, ***Dred Scott***, 53, 62, 140, 155.

[63]*Chicago v. Robbins*, 2 Black 418 (1862).

[64]*Gelpcke v. Dubuque*, 1 Wallace 175 (1864); Swisher, **Taney Period**, 335–39; Charles Fairman, **Reconstruction and Reunion, 1864–88: Part One, Oliver Wendell Holmes Devise History of the Supreme Court** (New York, 1971), vol. VI, 918–1116.

[65]*See supra* notes 2, 3.

[66]*Supra* note 64; Hovenkamp, **Enterprise**, 90–92; Purcell, **Brandeis**, 11–66; Edward A. Purcell, Jr., **Litigation and Inequality Federal Diversity Jurisdiction in Industrial America, 1870–1958** (New York, 1992), 28–210; Freyer, **Forums of Order**, 99–141, Freyer, **Harmony & Dissonance**, 45–100.

[67]Purcell, **Litigation and Inequality**, 28–210; Purcell, **Brandeis**, 39–94; Freyer, **Harmony & Dissonance**, 45–100.

[68]Purcell, **Litigation and Inequality**, 28–210; Tony Freyer, "Business Law and American Economic History," in Stanley L. Engerman and Robert E. Gallman, eds., **The Cambridge Economic History of the United States**, vol. 2, **The Long Nineteenth Century** (2000), 435–482.

[69]Purcell, **Litigation and Inequality**, 126–216.

[70]William H. Taft, "Criticisms of the Federal Judiciary," *American Law Review* XXIX (September–October, 1895), 651; William H. Taft to Horace Taft, June 12, 1928, Box 50, Folder 23, Oliver Wendell Holmes, Jr. Papers, Manuscript Division, Harvard Law School, Cambridge, Massachusetts.

[71]Purcell, **Litigation and Inequality**, 111–24, 131–37, 265–91; Freyer, **Forums of Order**, 121–36; Tony Freyer and Timothy Dixon, **Democracy and Judicial Independence: A History of the Federal Courts of Alabama, 1820–1994** (Brooklyn, NY, 1995), 59–134.

[72]Felix Frankfurter and James M. Landis, **The Business of the Supreme Court: A Study in the Federal Judicial System** (New York, 1927); *see also supra* note 67.

[73]*Supra* note 6.

[74]Freyer, **Harmony & Dissonance**, 86–92.

[75]Quoted in *id.*, 112–22, 114, 115, 116.

[76]*Muhlker v. N.Y. & Harlem R.R. Co.*, 197 U.S. 544, 573–74, 576 (1904); *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 271, 272 (1910); *Southern Pacific Company v. Jensen*, 244 U.S. 205, 220, 222 (1917); *Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.*, 276 U.S. 518, 533, 535 (1928).

[77]*Id.*; *see also supra* note 74.

[78]Purcell, **Brandeis**, 78–80, 82, 98, 101, 137–40.

[79]*Erie RR Co. v. Tompkins*, 304 U.S. 64 (1938); Irving Younger, "What Happened in *Erie*," 56 *Texas Law Review* 6 (June 1978), 1010–31; Purcell, **Brandeis**, 95–194; Freyer, **Harmony & Dissonance**, 101–53.

[80]*Erie*, 304 U.S. 64; Freyer, **Harmony & Dissonance**, 122–141; Purcell, **Brandeis**, 101–114.

[81]304 U.S. at 78–79.

[82]*Id.* at 90 (Reed, J, concurring).

[83]*Id.* at 80–90 (Butler, J, dissenting).

[84]Purcell, **Brandeis**, 115–308.

[85]*Supra* notes 31–37.

[86]*Supra* notes 18–19, 22, 23.

[87]Dunne, **Joseph Story**, 431.

The *Flag Salute Cases* Reconsidered

RICHARD MORGAN

Introduction

First, my very warmest thanks to the Supreme Court Historical Society for inviting me, to Chief Justice Roberts for his most gracious introduction (which I can only hope will not be retracted silently by the time I finish), and to all of you for coming inside on a glorious spring day to listen to an old professor talk about constitutional law.

For a brief while after Jennifer Lowe asked me to give this talk, I simply indulged the innocent pleasure that comes with being asked, and as this passed, I enjoyed thinking about leaving Maine at this most ghastly season of the year for a few days in Washington at cherry-blossom time.

But as these small glows faded, I came face to face with my assigned topic—the *Flag Salute Cases*. Not the contemporary kerfuffle over the reference to the Deity in the Pledge of Allegiance, but the old, honest-to-God *Flag Salute Cases* of 1941 and 1943—*Minersville School District v. Gobitis* and *West Virginia v. Barnette.*

What could I possibly say about these? They are part of the canon but are almost never taught. Indeed, in over forty years of introducing undergraduates to constitutional law I have never once taught them.

When I was a graduate student, in 1962, David Manwaring's wonderful study of the *Flag Salute Cases*, **Render Unto Caesar**, appeared. David was a much admired older friend, and I seethed along with him at the shameful treatment meted out to the witnesses in the early 1940s. Beyond that, I knew what everybody knows: that Stone's dissent in *Gobitis* and Jackson's opinion for the court in *Barnette* represented the way, the truth, and the light, and that Frankfurter's opinion in *Gobitis* and his dissent in *Barnette* were reprehensible and a blot on his reputation. But was I to come here and spend an hour rehearsing and celebrating the conventional wisdom? Even in my mellow old age, this was clearly insupportable.

After a day or two I was saved by an errant thought: A decade or so after Manwaring's book, I wrote about the early *Jehovah's Witness Cases* myself. And I recalled that *Barnette* was in Volume 319 of the **United States Reports**, and I recalled this because 319 also contained a gaggle of Witness cases dealing with door–to-door solicitation, which I thought then (and think now) were wrongly decided. And then the second saving thought—319 contained both Jackson's magisterial opinion in *Barnette* and one of his greatest but least attended dissents in the *Solicitation Cases*.

Here was my opening: An Unhurried View of Volume 319. (The literary allusion here will mean nothing except to the aged; **An Unhurried View of Erotica** was one of the first offerings to hit the streets after this Court announced the new dispensation with respect to sexually explicit material in *Roth v. United States* fifty-one years ago. Today, the book would probably be considered appropriate for middle-school libraries, but then it was quite hot stuff.) In any case, now encouraged, I went to my office set of the **United States Reports**. (That's right, buckram-bound volumes, no computer printouts!) And here was 319, still with my annotations of thirty-five years before. And the longer I spent with this "musty volume," the more I came to appreciate all of the lessons that it has to teach. These are the thoughts I will try to "unpack" for you today.

The *Solicitation Cases*

First, let us reflect on the *Solicitation Cases*—why they were important and why they were wrongly decided. And to do this, we must leave Volume 319 briefly, and travel back to Volume 310 and *Cantwell v. Connecticut*. Here, Justice Owen Roberts famously (but essentially without argument or explanation) extended the Free Exercise clause of the First Amendment to the states. But he also did something else: He clearly signaled a willingness to depart from the theretofore well established Supreme Court understanding of the breadth of the Free Exercise Clause. That prior understanding (and I shall spare you its genealogy today) was summed up by David Manwaring as the "secular regulation rule." Manwaring formulated it as follows: "There is no constitutional right to exemption on religious grounds from the compulsion of a general regulation dealing with non-religious matters." In other words, religious belief was altogether protected from government interference, but given an otherwise valid law or regulation, not designed pretextually to discriminate on the basis of religious belief, the religious believers were required to conform their behavior like everyone else, even though doing so was distasteful to them. At the heart of this approach was, essentially, a nondiscrimination principle: Government might not target religious groups because of their unpopularity, but neither could the religious groups demand special treatment when

In his dissents in the *Solicitation Cases*, Justice Robert H. Jackson (pictured) expressed the view that the right of the occupant to be left alone was no less worthy of governmental protection than the right of the itinerant preacher to go door to door propagating his faith.

some otherwise valid, public-regarding ordinance required them to do or refrain from doing things that violated their religious scruples. Manwaring traces this approach back to John Gibson's "classic dissent" in *Commonwealth v. Lesher*, and it received its Supreme Court imprimatur, of course, in Chief Justice Morrison Waite's opinion in *Reynolds v. United States* in 1879.

Now, consider what Roberts says in *Cantwell*:

> Thus the [first] amendment embraces *two* concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe upon the protected freedom [to act].

Under the old dispensation, government might regulate as long as it was not targeting a religious group discriminatorily. Following Roberts, the regulatory latitude of the community was more circumscribed. While the word "unduly" is mysterious, what one sees here, I think, is an early manifestation of a now-familiar judicial trope—that government would have to demonstrate that the means that it had chosen to accomplish a public purpose was the least burdensome possible in terms of limiting religiously motivated action. While today we are quite familiar with the requirement of "least burdensome alternative," in 1940 it was novel.

Now back to Volume 319. In addition to proselytizing in the streets (what got Jesse Cantwell in trouble), it became the practice of the Witnesses in the late 1930s to saturate neighborhoods and whole towns with workers who, under the direction of an organizer called an "area servant," moved from door to door offering literature for sale. Or, to be precise, contributions were requested in return for various pieces of literature according to a fixed schedule. "Judge" Joseph Franklin Rutherford, the Witnesses' leader at this time, said of the faithful,

> They do not loot nor break into houses, but they set up their phonographs before the doors and windows and send the message of the Kingdom right into the houses into the ears of those who might wish to hear; and while those desiring to hear are hearing, some of the "sour pusses" are compelled to hear. Locusts invade the homes of the people and even eat the varnish off the wood and eat the wood to some extent. Likewise God's faithful witnesses, likened them to locusts, take the Kingdom message right into the house and they'd take the veneer off the religious things that are in that house, including candles and "holy water," remove the superstition from the minds of the people, and show them that the doctrines that have been taught to them are wood, hay and stubble, destructible by fire, and they cannot withstand the heat.

Some communities felt disturbed and threatened by these Witness campaigns and either enacted new ordinances or applied old ones in attempts to regulate the "crash" canvassing practices.

Four cases involving these practices came to the Court and were decided in the wartime spring of 1943. In three of them—*Jones v. Opelika*, *Murdoch v. Pennsylvania*, and *Douglas v. Jeannette*—the issue was a tax levied by municipalities upon all those who sold anything door-to-door. The Witnesses, predictably, had not paid, and were convicted for the omission. *Douglas* went against the Witnesses on technical grounds, but in *Jones* and

Murdoch the convictions were overturned and the ordinances held unconstitutional as applied to the Witnesses.

The key opinion in these cases was written by William O. Douglas, and it is particularly troubling. Asserting that the practice of carrying the gospel directly into homes through "personal visitations" was a traditionally accepted technique of evangelism and thus something approaching a liturgical exercise, Douglas concluded that it "has the same claim to protection as the more orthodox and conventional exercises of religion," such as preaching in churches. The tax, he said, "restrains in advance the exercise of those constitutional liberties of press and religion and inevitably tends to suppress their exercise." The court was only restoring "to their high, constitutional position the liberties of itinerant evangelists who disseminate their religious beliefs and tenants of their faith through the distribution of literature." Douglas did not go so far as to suggest that the door-to-door activities of the Witnesses were absolutely unregulable by municipalities (that dubious honor appears to fall to this Court's 2002 decision *Watchtower Bible and Tract Society v. Stratton)*, but there was little in his opinion to indicate what restraints might be imposed. While making reference to the Free Exercise Clause, Douglas always linked it to the Speech Clause, referring to them almost as if they were interchangeable parts.

The fourth case decided that spring, *Martin v. Struthers*, involved a somewhat different fact situation. The city of Struthers, Ohio, a mill town in which many workers on night shifts slept during the day, enacted an ordinance prohibiting door-to-door canvassing of any kind, and the Witnesses ran afoul of it. Here Hugo L. Black spoke for the Court. This was not, Black pointed out, a garden-variety "green river" ordinance aimed exclusively at commercial solicitation (these were the days before *Virginia Pharmacy* when the Court did not much trouble itself with commercial speech), but a prohibition of all uninvited approaches, no matter the purpose or motive. Phrasing his opinion more in free-speech than in free-exercise terms, Black noted that the "freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of the time and manner of distribution, it must be fully preserved." It might be possible, Black suggested, to enact an ordinance punishing those who approached doors after explicit warning by the occupant that approaches were not desired, but a blanket restriction was unconstitutional. Justice Frank Murphy added a brief concurrence stressing, similarly, that the ordinance was overbroad.

Both Stanley Reed and Felix Frankfurter filed dissents from the tax cases. Reed principally addressed the speech argument, pointing out that the First Amendment had never been conceived as exempting all those associated with publishing and purveying the written word from paying taxes on their activities. Justice Frankfurter took the free-exercise point, arguing that a tax cannot "be invalidated merely because it falls upon activities which constitute the exercise of a constitutional right." He strongly reaffirmed the secular-regulation approach, arguing that nothing in the Constitution "exempts persons engaged in religious activities from sharing equally in the costs of benefits to all, including themselves, provided by the government." And, in a flash of prescience, he noted that granting such exemptions on free-exercise grounds might create a tension between free exercise and the Establishment Clause. Reed also filed a brief dissent in *Martin v. Struthers*, characterizing the prohibition on canvassing as an "insurance of privacy."

Robert H. Jackson wrote a long opinion dissenting from the majority reasoning with respect both to tax requirements and to prohibition on canvassing. Focusing principally on *Jeannette*, the only one of the cases in which there was an extensive record of how the Witnesses' canvassing actually worked, Jackson

put its darker side on full display, quoting from a Judge Rutherford pamphlet denouncing the Roman Catholic church as a harlot and picturing "the Jewish and Protestant clergy and other allies of the Hierarchy who tag along behind the Hierarchy at the present time to do the bidding of the old whore," and relating the testimony of a mother who testified she was told "that I was doomed to go to hell because I would not let this literature in my house for my children to read." "Such is the activity," Jackson wrote, "which it is claimed no public authority can either regulate or tax."

> We have held that a Jehovah's Witness may not call a public officer a "god-damned racketeer" and a "damned fascist," because that is to use "fighting words," and such are not privileged. *Chaplinsky v. New Hampshire*, 315 U.S. 568. How then can the court today hold it a "high constitutional privilege" to go to homes, including those of devout Catholics on Palm Sunday morning, and thrust upon them literature calling their church a "whore" and their faith a "racket"?

But Jackson reserved his finest scorn for Douglas's declaration that "this form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits." "How," Jackson asked, "can we dispose of the questions in this case merely by citing the unquestioned right to minister to congregations voluntarily attending services?" And as for Black,

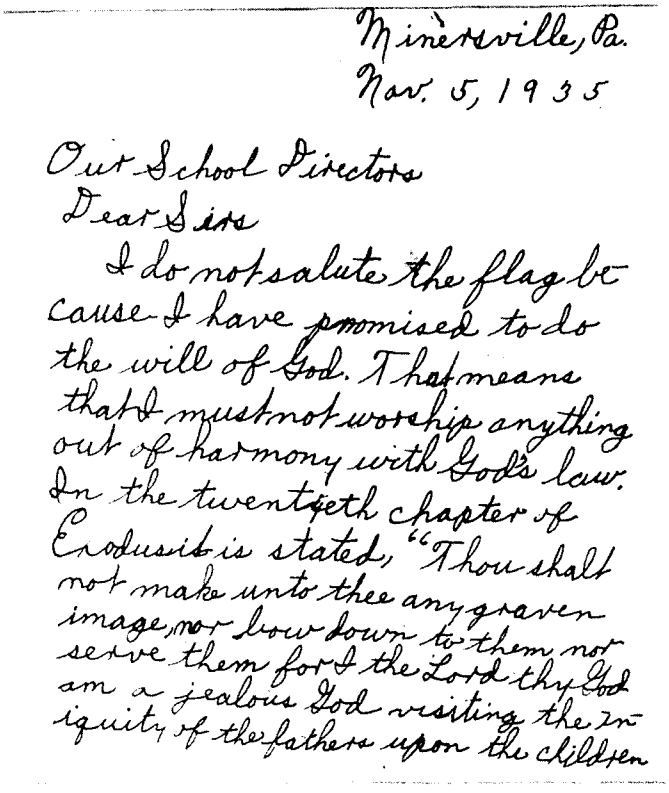
> I find it impossible to believe that the *Struthers's* case can be solved by reference to the statement that "The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance." I doubt if only the slothfully ignorant wish to repose in their homes, or that the forefathers intended to open the door to such forced "enlightenment" as we have here.

For Jackson, the right of the occupant to be left alone was no less worthy of governmental protection than the right of the itinerant preacher to propagate his faith. What was needed in *Martin* and the other cases was a delicate balancing of competing claims, which was too difficult "to be disposed of by a vague but fervent transcendentalism." Like Frankfurter, Jackson saw a potential contradiction of the Establishment Clause in any special exemption of religiously motivated behavior from otherwise valid secular regulations. Religious and nonreligious behavior enjoyed the freedom of expression guaranteed by the Speech Clause, but beyond that Jackson "had not supposed that the rights of secular and non-religious communications were any more narrow or in any way inferior to those of avowed religious groups."

This opinion, described in the most recent (and determinedly partisan) history of the *Jehovah's Witness Cases* as "virulent," was, in fact, one of Jackson's masterpieces.

The *Flag Salute Cases*

Now let's turn to the *Flag Salute Cases*. We are accustomed to thinking of them as an instance of dramatic reversal, but few of us really understand what a huge reversal they really represented and that the process of reversal actually began *before Gobitis*. The modern school flag-salute ceremony dated from 1892, and the first salute statute passed the legislature of New York in 1898, one day after the United States declared war on Spain. Manwaring found that before 1940, thirty states had the ceremony as part of the school ritual, and in most of these, participation was compulsory. Judicial attacks had proven uniformly unsuccessful, with some courts citing the secular-regulation



Minersville, Pa.
Nov. 5, 1935

Our School Directors
Dear Sirs

I do not salute the flag because I have promised to do the will of God. That means that I must not worship anything out of harmony with God's law. In the twentieth chapter of Exodus it is stated, "Thou shalt not make unto thee any graven image, nor bow down to them nor serve them for I the Lord thy God am a jealous God visiting the iniquity of the fathers upon the children

Twelve-year-old Billy Gobitis explained in his own words why, as a Jehovah's Witness, he could not salute the flag.

rule and other courts not reaching a constitutional question at all.

The Witnesses' involvement with the flag-salute controversy began in Massachusetts in 1935. The Lynn public schools had a long-standing practice of opening exercises that included the salute, and in September a young Jehovah's Witness, Carlton Nichols, Jr., began standing quietly during the ceremony but taking no further part. Carlton's father backed his son, explaining,

> The scriptures prove the truth of my assertion that this world, this country, and the entire worldly kingdom, is not possessed by any government or any country, but by the devil . . . Why, then, should I, or my son, pledge allegiance to the devil's kingdom?

On October 6, Judge Rutherford delivered a blistering radio address titled "Saluting a Flag," seeking to mobilize the Witnesses behind the Nichols' family and against the flag salute. The Lynn School Committee voted to exclude Carlton from school until he chose to conform, and his father sued for a writ of mandamus against the Mayor and the School Committee before Justice Henry T. Lummus of the Supreme Judicial Court. Lummus referred the matter to the full court, and in a unanimous decision on April 4, 1937, invoking the secular-regulation rule, the Witnesses lost. The American Civil Liberties Union (ACLU), which had initially offered to support an appeal to the Supreme Court of the United States, declined to go further on the advice of its local counsel.

Given the strong popular support for the flag salute and the uniformly negative reaction by courts to challenges brought against it, the remarkable thing about *Gobitis* is not that the Witnesses lost, but that they actually

won in the lower courts and even attracted one vote at the Supreme Court level—that of Harlan Fiske Stone. The *Gobitis* case came out of the hard-coal country of Pennsylvania and attracted national interest all along the way. The *Gobitis* children refused to salute, citing the standard Witness grounds for refusal from Exodus 20:3–5:

> You shall have no other gods before me.
>
> You shall not make yourself a graven image, or any likeness of anything.
>
> ...You shall not bow down to them or serve them...

(Grounds less colorful than those advanced by Carlton Nichols' father, but with better textual grounding). *Gobitis* was tried in federal district court in Philadelphia, and it was here that the Witnesses' fortunes began to change. It was a victory for the nonconforming children, if not for coherence in constitutional law. Judge Albert Maris was cheerfully willing to overthrow the secular regulation with starry eyes that seemed almost to see forward to 1963 and *Sherbert v. Vermer*. And as for the efficacy of the salute, he asked, how could forcing the Witness children to repeat words they detested instill patriotism? At the Third Circuit, William Clark wrote for a unanimous panel, claiming that the secular-regulation rule had never been enforced to protect so trivial a governmental interest as was at stake here. And he followed Maris in identifying that interest as instilling love of country in William and Lillian Gobitis by requiring them to salute the flag. Both Maris and Clark conceived the case in free-exercise terms, asking whether exemption for religiously motivated objectors from an otherwise legitimate government program was required, and both were prepared to overthrow settled doctrine to answer in the affirmative. Then it was on to the Supreme Court, under the direction of Judge Rutherford himself and Hayden Covington, who had come aboard as house counsel.

Amicus curiae briefs were submitted by the ACLU and by the Bill of Rights Committee of the American Bar Association (ABA). Both of these are interesting. The ACLU brief purported to stick by the secular-regulation approach and quoted *Reynolds* with approval. Conduct could be regulated in the aid of any legitimate legislative purpose; belief was absolutely protected. However, what was involved in the flag salute, the brief reasoned, was not regulation of conduct at all but the imposition of a religious belief. This was not the practice of polygamy or the refusal to be vaccinated or any other behavior that the state had a right to punish in reasonable furtherance of a community interest. The salute was coercion in the realm of ideas, which the Free Exercise Clause had historically been considered as protecting. By characterizing the salute as coercion of religious belief, the ACLU drafters craftily sought to reassure the Court that it could decide for the Witness children *without* upsetting any settled doctrine.

The ABA brief, written primarily by Zecharia Chafee, took a quite different tack. Forsaking the secular-regulation doctrine, it called for an ad hoc balancing of the competing claims of government to regulate and of the individual both to believe *and to behave* in such manner as sincere religious convictions might direct (another intimation of *Sherbert v. Verner*). How important is the interest of the individual? How important is the interest of the state? And are there other ways in which that interest could be satisfactorily secured without limiting religiously motivated behavior?

Justice Frankfurter delivered the opinion of the Court divided 8 to 1, and he has been unfairly pilloried for it ever since. Try this experiment: Read through the opinion and see if you don't think, as I do, that Frankfurter labored throughout under a sharp sense that he was doing the wrong thing, but that within the four corners of settled *free-exercise doctrine* there was no way he could reach the outcome to which his instincts, I think, prompted him. And it was just here, as Robert Jackson pointed

out three years later, by assuming that the case had to be settled on free-exercise grounds, that Frankfurter made his mistake. As a simple commonsense matter, he could not accept the ACLU's suggestion that the flag salute in any way foisted a religious belief on the Gobitis children. The exercise was purely secular, and the only question to be answered was whether it was a legitimate exercise of Pennsylvania's legislative power. He concluded that the pledge was a reasonable means to the end of fostering patriotic regard and thus a valid secular regulation. He did not doubt the sincerity of the Gobitis children or the principled nature of their objection, but "conscientious scruples have not in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs." He could accept neither the argument by the ACLU that the flag salute imposed a religious belief nor the invitation by the ABA to abandon the secular-regulation rule and begin ad hoc balancing. He was trapped, and he would retain his commitment to the secular-regulation rule right through the *Sunday Closing Cases* of 1961.

Stone alone dissented. And full marks to him, along with Maris and the panel of the Third Circuit, for at least getting the outcome right; unfortunately, Stone did no better than Maris or Clark in explaining why. He made sweeping references both to free exercise and to free speech without specifying how, precisely, either of these was violated. Even more troubling was Stone's willingness—nay, *eagerness*—to review and correct the legislative policy judgment that a compulsory flag salute advanced an important governmental interest. Here he advanced under the banner of his *Carolene Products* footnote, offering it as embodying the Court's established willingness to undertake "searching judicial inquiry into the legislative judgment" when minority interests were at stake. The old distinction between belief and action seemed meaningless to Stone, and the sense of this famous opinion appears to be that secular regulations should override claims for religious exemptions only when the most important social values, such as monogamous marriage or the prevention of the spread of disease, are involved. In this, he moved even beyond the ad hoc balancing approach that had been urged by the ABA.

The reaction of the press, the legal academy, key members of the Roosevelt administration, and even some lower-court judges was highly unfavorable to the Frankfurter opinion in *Gobitis*. As Manwaring points out, Frankfurter's workmanlike assertion of what, before *Cantwell* at least, had been settled law was distorted into an assertion that national unity was more important than religious scruples. Stone was lavishly praised for expressing the essential general spirit of the First Amendment—the best possible compliment under the circumstances. Furthermore, and to the huge embarrassment of the Justices, *Gobitis* was seized upon by thugs and superpatriots, and instances of violence against Witnesses escalated as the war news became bleaker.

A decision that draws as much fire as *Gobitis* (and supplies a rallying cry to hoodlums—"they're traitors, the Supreme Court said so"), is not likely to endure for the ages. Murphy, Black, and Douglas clearly signaled in 1942 that they were prepared to abandon *Gobitis*, and in 1943 a somewhat altered Supreme Court (Stone had succeeded Charles Evans Hughes as Chief Justice, and Jackson and Wiley Rutledge had replaced Stone and James F. Byrnes, respectively) heard oral arguments in a second flag-salute case. Coming on the heels of the Witnesses' sweep in the solicitation cases, it was clear how the flag-salute issue would go the second time around. When *West Virginia State Board of Education v. Barnette* finally came down on June 14, 1943, Justice Jackson wrote for a Court divided 6 to 3, striking the mandatory flag salute.

The briefing in this second case had occasioned one innovation. The ACLU, loyal to the Witnesses' cause despite repeated rebuffs

by Judge Rutherford, now borrowed from the constitutional law of free speech, suggesting that unless the religiously motivated behavior constituted a "clear and present danger" to the community, it could not be regulated no matter how worthy or reasonable the legislative purpose. This, at least, was better than the ad hoc balancing suggested by the ABA in its *Gobitis* brief. Adopting it, however, would immunize against regulation by the community huge swaths of religiously motivated nonconforming behavior and advantage religious persons hugely over those desiring to escape regulation on nonreligious grounds. The ACLU was now seeking the obliteration of the secular-regulation rule, and in Judge John R. Parker's opinion for the three-judge panel that tried *Barnette*, the "clear and present danger" suggestion carried the day.

Justice Jackson disdained this bait. As might have been expected from his opposition to the solicitation decisions, he was not enthusiastic about what he regarded as reckless extension of the Free Exercise Clause. As Manwaring noted, quite correctly, Jackson was no more willing than Frankfurter to "jettison" the secular-regulation rule. What he saw that Frankfurter hadn't was that the flag-salute issue was not properly framed in free-exercise terms. Jackson took the case on free-speech grounds, and rather than asking whether it was constitutional for West Virginia to require the Barnette girls to salute the flag, he asked whether the state could compel anyone, religious or indifferent, to do so. Unlike the solicitation cases, Jackson wrote, the "freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual." Nor was it "necessary to inquire whether nonconformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty." That point had been *assumed* in *Gobitis*, and that was where the decision went wrong. The pledge involved "a form of utterance," and was an "affirmation of belief and an attitude of mind." Neither was it necessary to scrutinize, strictly or otherwise, the policy decision of the West Virginia legislature. The "validity of the asserted power to force an American citizen publicly to profess any sentiment or belief or to engage in any ceremony of assent to one, presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question." A flag salute was a ceremony "touching matters of opinion and political attitude" and could not be imposed "by official authority under powers committed to any political organization under our constitution."

Undergirding Jackson's opinion is an important point of American political theory; our governmental institutions rest upon *consent*, and consent may not be commanded—even of the young, even in the course of public-school instruction. And then what is, perhaps, his most memorable paragraph:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Thus was born what we call today in the lingo of constitutional law the "compelled speech doctrine."

Not all the majority Justices were satisfied. Justices Douglas and Black concurred, and seemed to prefer the vaulting approach of the ACLU brief. Since the "little children" had done nothing to disturb "domestic tranquility" or to erode the nation's "martial power in war," they deserved protection under the Free Exercise Clause. While not formally adopting the "clear and present danger" test for free exercise, their opinion comes close. Justice Murphy also concurred, and also seemed to want something close to but not quite a "clear and present danger" test. He asserted a right to

Before 1940, thirty states had the flag-salute ceremony as part of the school ritual, and in most of these, participation was compulsory.

free-exercise protection of nonconforming behavior that operated "except in so far as essential operations of our government may require it for the preservation of an orderly society—as in the case of compulsion to give evidence in court." Justice Frankfurter dissented alone and bitterly, accusing his colleagues of acting beyond their warrants as judges by not deferring to legislative judgment of reasonableness, as he had argued in *Gobitis.*

With the decision of the second flag-salute case, the Free Exercise Clause moved to the fringe of American constitutional politics for almost two decades. Sharp judicial combat over exemptions for religiously motivated nonconforming behavior would be renewed in the 1960s and beyond. But in the course of disposing of the wealth of business created by the factitious Witnesses in the 1930s and 1940s, the Court skidded partway into a constitutional turn of the first importance. The secular-regulation rule had been weakened, and it seemed possible by 1943 that the Free Exercise Clause would emerge as a far more important limitation on government's power to regulate behavior than would have been thought possible before *Cantwell.* Despite the best efforts of Frankfurter, and especially of Jackson, their Brethren Roberts, Douglas, Black, and Murphy (and Maris, Clark, and Parker below) *had written*, and their words remained for future advocates to weld into argumentative weapons. This Court remains divided over whether to commit itself fully to the new road or turn back to the old. And that takes the issue into Chief Justice Roberts' province and out of mine.

So What?

But what, if anything, do these early tussles over free exercise, and these two magnificent Jackson opinions, have to teach us more generally about our constitutional history and about

how we should view contemporary constitutional law? I will offer three disparate, but I hope related, thoughts.

First, the events that I have been discussing constitute an important phase in the gestation of what today we refer to as the "rights revolution." While we usually apply that phrase to the salad days of the Warren Court, scholars have long recognized that the roots of revolution run back into the Roosevelt Court of the late 1930s and early 1940s. And what one thinks about the end product will very much affect what one thinks about the beginnings. So for any who might not have already have guessed it, let me make my position clear: While I am far from rejecting all of the rights jurisprudence of the last sixty years (after all, I think that *Barnette* was correctly decided), I think much of it vaultingly, thoughtlessly libertarian and supported by judicial prepossession and vacuous abstractions rather than by disciplined arguments from text and history. Furthermore, it is characterized by a persistent failure to take into account the conflicting legitimate interests always present in civil liberties cases. Prefiguring so much that was to take place in the later years of the rights revolution was Justice Douglas's declaration in *Murdock* that door-to-door solicitation "occupies the same high estate under the first amendment as do worship in churches and preaching from the pulpits." And Justice Black in *Struthers* runs a close second, characterizing the situation as involving "[f]reedom to distribute information to every citizen wherever he desires to receive it."

A second observation as to how the later excess of the rights revolution were prefigured in its early stages focuses on Justice Stone's invocation of his *Carolene Products* footnote. The common criticism of "Footnote 4" (and quite correct it is) charges that the introduction into American constitutional thinking of "preferred positions" for certain rights over others is a serious deformation of our constitutional tradition. (After all, the *civil liberty* that the Framers at Philadelphia saw endangered and cared most about was neither freedom of speech nor of religion—or the right to bear arms!—it was property.) But I am going to dwell on a different, more corrosive aspect of Footnote 4: its standing invitation to future courts to boldly remake legislative policy judgments. A wonderful example of where this would lead comes from Chief Justice Earl Warren in *O'Brien,* in 1968, where he listed the various "standards" employed by the Court in evaluating the quality of the governmental interest in any particular public policy—"compelling; substantial; subordinating; paramount; cogent; strong." But when one actually considers what is involved in a legislative policy judgment, the impossibility of applying such distinctions of elfin delicacy (at least applying them with anything like intellectual respectability) vanishes. To make clear why this is so, let me revisit with you one of my favorite books—Judge Learned Hand's 1958 Holmes Lectures at Harvard, published that same year as **The Bill of Rights**. Today, the book is not studied and its argument little regarded. It is unlikely that anyone who published and stuck by such an argument could be confirmed by the Senate for appointment to the federal Bench. But Hand's view of the proper relationship between courts and legislatures remains unsurpassed. For him, the essence of a policy choice—of a legislative choice in the nominal case—was a ranking of conflicting values and a guess about the future. In the theory of our Constitution, the value rankings and the guesses should be unreviewable by courts. The only question for the judiciary was a formal one, a definitional one: does the legislature have authority to act with respect to this subject? If it does, its rankings of values (preferring some, disfavoring others) is none of the Court's business; if does not, nothing in the substance of the policy (no matter how attractive the value choice or how brilliant the guess about the future appears) can save it. The court was to speak in rules, not in standards. And in the light of this, consider Jackson's *Barnette* reasoning: The West Virginia

legislature was attempting to do something beyond its power, and it mattered not whether the governmental interest was "compelling" or merely legitimate, and it mattered not whether the means chosen were narrowly or loosely tailored. Determinations of degree and choices of means are not to be remade by judges. Whether or not the required flag salute was a good or ineffective way of inculcating patriotism was quite beside the point. And when judges are minded to bandy utilities with the legislature, they might bear in mind the dog's breakfast that the judges below in *Gobitis* (Maris at the district court and Clark for the circuit) made of the exercise. Both asked whether requiring the Witness children to repeat words offensive to them would instill love of country; but the point of course was that the pledge was wildly popular with the vast majority of students and appeared to be achieving its objective admirably, and this left the real question—if you wish to bandy utilities, which you shouldn't—whether exempting the Witness children would risk *compromising an otherwise effective program*. It was this to which Justice Stone encouraged courts with his reference to "the importance of a searching judicial inquiry into the legislative judgment."

Thirdly and lastly (and here I have again, of course, tipped my hand), I want to emphasize how, in area after area of constitutional law, what Robert Jackson inveighed against in the 1940s and early 1950s has today come to pass. We are living to a significant extent in the doctrinal future that he feared, and most students of American constitutional development are delighted by it. But for the ever-growing minority who are not, they could do no better in sharpening their wits and their arguments than to attend, not only to the famous opinion in *Barnette*, but to the largely forgotten dissents and concurrences. We have noted how he punctured Justice Douglas's balloon in the solicitation cases, but I would equally commend to your attention his warnings against the growing enthusiasm of his Brethren to restrict police interrogation of criminal suspects—the enthusiasm which would ultimately lead to *Miranda v. Arizona*. In *Ashcroft v. Tennessee*, in 1944, Jackson spoke to the issue of psychological coercion:

> The Court [through Justice Black] bases its decision on the premise that custody and examination of a prisoner for thirty-six hours is "inherently coercive." Of course it is. And so it custody and examination for one hour. Arrest itself is inherently coercive, and so is detention. When not justified, infliction of such indignities upon the person is actionable as a tort. Of course such acts put pressure upon the prisoner to answer questions, to answer them truthfully, and to confess if guilty.
>
> But does the constitution prohibit use of all confessions made after arrest because the questioning, while one is deprived of freedom, is "inherently coercive"? The Court does not quite say so, but it is moving far and fast in that direction.

And in *Watts v. Indiana* in 1949, Jackson addressed the issue of uncounseled interrogation.

> If the state may arrest on suspicion and interrogate without counsel, there's no denying the fact that it largely negates the benefit of the constitutional guarantee of the right to assistance of counsel. Any lawyer who has ever been called into case after his client has "told all" and turned any evidence he has over to the government, knows how helpless he is to protect his client against the facts disclosed.
>
> I suppose the view one takes will turn on what one thinks should be the right of an accused person against the State. Is it his right to have the judgment on the facts? Or is it his right to have a judgment based on only such evidence as he cannot conceal from the authorities, who cannot compel him to testify in court and also

> cannot question him before? . . . But if the ultimate quest in a criminal trial is the truth and if the circumstances indicate no violence or threats of it, should society be deprived of the suspect's help in solving a crime merely because he was confined and questioned when uncounseled?

Or consider Jackson on speakers who incite to violence or who traffic in fighting words. In his dissent in *Terminiello v. Chicago* in 1949, which overturned the conviction of a fascist provocateur whose speech had, in fact, led to violence, he wrote

> The ways in which mob violence may be worked up are subtle and various. Rarely will a speaker directly urge a crowd to lay hands on a victim or class of victims. An effective and safer way is to incite mob action while pretending to deplore it, after the classic example of Antony, and this was not lost on Terminiello. And whether one may be the cause of mob violence by his own personification or advocacy of ideas which a crowd already fears and hates, is not solved merely by going through a transcript of the speech to pick out "fighting words." The most insulting words can be neutralized if the speaker will smile when he says them, but a belligerent personality and an aggressive manner may kindle a fight without use of words that in cold type shock us. True judgment will be aided by observation of the individual defendant, as was possible for this jury and trial court but impossible for us.

And a year later Jackson dissented in *Kunz v. New York*, which reproved the City for denying a license for street preaching to an agitator who on multiple previous occasions had been guilty of precipitating altercations by engaging in what we today, would call hate speech. Referring to Justice Murphy's famous sentence from *Chaplinsky v. New Hampshire* and recalling that the fighting words in that case consisted of "God damned racketeer" and "damned fascist," Jackson wrote that

> [e]qually inciting and more clearly "fighting words," when thrown at Catholics and Jews who are rightfully on the streets of New York, are statements that "The Pope is the anti-Christ" and the Jews are "Christ-killers." These terse epithets come down to our generation weighted with hatreds accumulated through centuries of bloodshed. They are recognized words of art in the profession of defamation. They are not the kind of insult that men bandy and laugh off when the spirits are high and the flagons are low.... Their historical associations with violence are well understood, both by those who hurl and those who are struck by these missiles.

And Jackson offered a general reflection on the meaning of the Speech Clause which, unhappily, went little heeded in future years:

> Read as literally as some would do, it restrains Congress in terms so absolute that no legislation would be valid if it touched free speech, no matter how obscene, treasonable, defamatory, inciting or provoking. If it seems strange that no express qualifications were inserted in the amendment, the answer may be that the limitations were thought to be implicit in the definition of "freedom of speech" as then understood . . . It is significant that provisions adopted by the people with the awareness that they applied in their own states have universally contained qualifying terms. The constitution of Illinois is representative of the provisions put in nearly all state constitutions and it reads

> (Art. II, 4): "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty." That is what I think is meant by the cryptic phrase "freedom of speech," as used in the Federal Compact . . .

Or consider the Fourth Amendment exclusionary rule, fatefully extended to the states in *Mapp v Ohio.* In *Irvine v. California*, eight years before, Jackson had written that

> [t]here is no reliable evidence known to us that inhabitants of those states which exclude the [illegal] evidence suffer less from lawless searches and seizures than those of states that admit it. . . . That the rule of exclusion and reversal results in the escape of guilty persons is more capable of demonstration than that it deters invasions of right by the police.

Finally, consider Jackson's reservations concerning incorporation, the application of the specifics of the Bill of Rights against the states through the Due Process Clause of the Fourteenth Amendment. In several instances in which the Brethren were applying Bill of Rights norms to states, Jackson reminded them that such applications rest "entirely on authority which this Court has voted to itself." He did not quarrel with incorporation as settled law, but recalled "the method by which the right to limit the state has been derived only from this court's own assumption of power, with never a submission of legislation or amendment into which the people could write any qualification to prevent abuse of this liberty, as bearing on upon the restraint I consider as becoming in exercise of self-given and unappealable power." Even more radically (as judged from the contemporary perspective), Jackson favored applying Bill of Rights norms differentially against the national government and the states. In his dissent in *Beauharnais v. Illinois* in 1952, he attacked the assumption "that the 'liberty' which the due process clause of the Fourteenth Amendment protects against denial by the states is the literal and identical 'freedom of speech or of the press' which the First Amendment forbids only Congress to abridge." And he made a considerable argument from precedent for this position, quoting the sainted Holmes, joined by Brandeis, in the *Gitlow* dissent:

> The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word "liberty" as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States.

Suppose Jackson's view had prevailed. What difference might it have made? Fifteen years after *Beauharnais*, John Marshall Harlan would invoke Jackson in a futile attempt to distinguish between the obscenity cases of *Roth v. United States* and *Alberts v. California*, advancing an eloquent argument as to why the states should enjoy greater flexibility under a Fourteenth Amendment speech standard than did the national government under the specific interdict of the First Amendment.

But it is time to end this little story of roads not taken and warnings unheeded. I can now thank the Supreme Court Historical Society not only for the trip but for its assigned topic, because it returned me to Robert H. Jackson. It's the fashion in constitutional studies today to kiss off Jackson with the comment "yes, he was a grand writer," the unstated but clear implication being "phrasemaker, but intellectual lightweight," a rhetorician unconcerned with rules or doctrine. If anything that I have said this evening moves you to return to Volume 319 of the **U.S. Reports** and to work your way forward to 1955, you'll determine for yourself whether such dismissals of Jackson are smart or slander, and my time will have been well spent.

Why *Dennis v. United States* is a Landmark Case

MICHAL R. BELKNAP

A landmark, Webster's *New Collegiate Dictionary* tells us, is "an event or development that marks a turning point or a stage." In my life, the case of *Dennis v. United States*[1] is a landmark, or perhaps more accurately, a series of landmarks. My 1973 doctoral dissertation was on *Dennis*.[2] Four years later that thesis became my first book.[3] My second book, a collection of articles on American political trials that appeared in 1981, contained an essay by me on *Dennis*.[4] By then, I assumed, I had said about everything I had to say on the case. In 1993, though, Mel Urofsky brought me back to it, asking me to write a retrospective article on *Dennis* for the *Journal of Supreme Court History*, of which he had just become the editor.[5] Now, fifteen years later, here we are together again. I am beginning to think that the "grave and probable danger" test that *Dennis* introduced into constitutional law will be inscribed on my tombstone.

But does *Dennis* merit such attention? Does it really matter much to anyone who has not spent nearly four decades living with the case? Apparently it does, at least to constitutional historians. William Wiecek devotes a full chapter of his prize-winning history of the Supreme Court during the chief justiceships of Stone and Vinson to *Dennis*.[6] Professor Urofsky gives it five pages in the constitutional history of the United States that he coauthored with Paul Finkelman.[7] That is a two-volume book, but even Michael Les Benedict, who seeks to cover that gigantic subject in a single volume of only 430 pages, devotes 2 of them to *Dennis*.[8] The case is included in legal history casebooks edited by Urofsky and Finkelman[9] and by Finkelman, James W. Ely, Jr., and the late Kermit Hall.[10] In a book on major problems in American constitutional history, Hall devoted a full chapter to *Dennis*, excerpts from books by Walter Berns and myself examining the decision, and a single contrasting case.[11] Wiecek regards *Dennis* as one of only two decisions of the rather undistinguished Vinson Court that "remain[s] of lasting significance."[12]

But why? Although Harry Kalven called *Dennis* "a great moment in Supreme Court history,"[13] its contemporary legal importance certainly does not warrant the attention the

William Z. Foster, Benjamin Davis, Eugene Dennis, Henry Winston, John Williamson, and Jacob Stachel, members of the national board of the Communist Party of the United States (CPUSA), were photographed leaving the courthouse in New York in1948. They were charged with, and eventually convicted of, violating the Smith Act, the 1940 law that made it a federal crime to teach and advocate the overthrow of the government by force and violence or to belong to an organization that engaged in such teaching and advocacy.

case has received. That is something of which I am painfully reminded every time I teach constitutional law. With too many topics to cover and too little time in which to do it, I find it increasingly difficult to justify, even to myself, forcing my students to spend forty-five minutes on a case they will never encounter on a bar exam, just because I happen to know more about it than anyone else who is still alive.

Dennis was once terribly important. When it came down in 1951, the decision legitimated a legal war on the Communist Party of the United States (CPUSA) that the U.S. Department of Justice had launched in 1948, when it secured the indictments of all twelve members of the party's National Board on charges of violating a sedition statute known as the Smith Act.[14] That 1940 law made it a federal crime to teach and advocate the overthrow of the government by force and violence or to belong to an organization that engaged in such teaching and advocacy.[15] Following a tumultuous nine-month 1949 trial in the federal courthouse on New York's Foley Square, a jury convicted eleven members of the National Board of conspiracy to violate the Smith Act.[16] They appealed to the U.S. Court of Appeals for the Second Circuit, challenging, among other things, the constitutionality of the law the government had used against them. In an opinion by Chief Judge Learned Hand, that court rejected their contention that the Smith Act violated the First Amendment's guarantee of freedom of expression.[17] In *Dennis v. United States*,[18] the Supreme Court, although badly divided over precisely how to resolve the free-speech issue, affirmed the Second Circuit's decision by a vote of 6–2.[19]

The government treated the Court's ambiguous ruling affirming the constitutionality of the Smith Act[20] as a green light for further prosecutions under that law. Eventually, it charged 126 "second string" Communist leaders with conspiracy to violate the Smith Act and prosecuted nine more under the statute's membership clause.[21] *Dennis* made this legal war on the CPUSA possible. But the campaign it seemed to sanction ground to a halt after the Court's 1957 decision in *Yates v. United States*.[22] Bent on stopping what they regarded as the excesses of that crusade, Justices John Marshall Harlan and Felix Frankfurter asked their clerks to spend the summer of 1956 researching ways to rein in a war on the CPUSA they believed had gotten out of hand.[23] In a memorandum to his clerks, Harlan advised them "that one of the factors which led to our taking these [second-string] cases was the feeling of some members of the Court that we should take a new look at these Smith Act conspiracies in light of the accumulated post-*Dennis* experience; particularly ... the character of the evidence which the lower Courts have come to accept as sufficient."[24] He authored an opinion in *Yates* that, while not invalidating the Smith Act, did lay down evidentiary requirements for convictions under that statute that the government could not meet.[25] Harlan also interpreted its membership clause in a way that made impossible the prosecution of any more Communists under that provision.[26]

Although eventually thwarted by the *Yates* decision, the Supreme Court's Smith Act campaign against the Communist party crippled a once potent radical organization. It did not do this in quite the way the government had contemplated. The Smith Act prosecutions failed to decapitate the CPUSA, for most of those they targeted soon returned to active roles in the party.[27] Other evidence supports the boast of defendant John Williamson that "[o]f the many Party leaders arrested, tried, and sentenced under the Smith act ... the overwhelming majority stood the test of battle."[28]

The prosecutions did, however, result in a dramatic reduction in the size of the CPUSA. The reason was not that fear of the Smith Act inspired a mass exodus from the party. Rather, it was that the parade of once-trusted comrades who took the stand at Foley Square and in subsequent trials inspired in Communists a fear of informants in their ranks that caused them to eliminate many of their own members.[29] As FBI Director J. Edgar Hoover explained at the time: "Member after member completely innocent of the Party's charges [was] expelled."[30] In addition to this "housecleaning," many loyal but inactive members were purged from the ranks of the CPUSA.[31] A reluctance to take in new members who might prove to be government spies led to a curtailment of recruiting.[32] Even more disastrous was the party's decision to send much of its membership underground in order to protect it from prosecution. Conflicts developed between these "unavailables" and those Communists still operating in the open.[33] Security measures adopted to protect the party from prosecution impaired the efficiency of its operations, making it slow-moving and excessively bureaucratic.[34] Its suicidal efforts to protect itself from the Smith Act deprived the CPUSA of two-thirds of its members and rendered it a helpless cripple.[35]

While the Smith Act prosecutions that *Dennis v. United States* unleashed decimated the Communist party, its impact on that small and vilified radical organization vastly exceeds its effect on the law. In his outstanding 2004 study of the impact of war and related national security crises on freedom of expression, Geoffrey Stone observes that, "[o]ver time, the [Supreme] Court and the nation came to regard *Dennis* as an embarrassment, or worse ... [I]n the long run it was shunted aside and, eventually, overruled."[36] Professor Stone, an expert on free-speech law and the editor of a widely used constitutional law casebook,[37] is accurate concerning the current significance of *Dennis*. About the fate of the 1951 Communist case,

however, he is only half right. *Dennis* has never been overruled. It only seems that way.

Dennis v. United States is virtually synonymous with the new test that it introduced into free-speech law. In the Communist case, Vinson purported to explain, but actually significantly modified, the classic "clear and present danger" test developed by Justice Oliver Wendell Holmes, Jr. and refined by Justice Louis Brandeis.[38] Adopting verbatim the language first used in *Dennis* by Chief Judge Learned Hand of the United States Court of Appeals for the Second Circuit, Chief Justice Vinson wrote: "In each case [courts] must ask whether the gravity of the 'evil' discounted by its improbability justifies such invasion of free speech as is necessary to avoid the danger."[39] This approach "makes probability and imminence—two seeming requirements of a clear and present danger test—irrelevant."[40] As Erwin Chemerinsky explains: "If the harm is great enough, such as the overthrow of the government, then speech advocating it can be punished without any showing of likelihood or imminence."[41] "For the clear and present danger test," Francis Wormuth pointed out in 1953, it "substitutes a 'grave and probable danger' test."[42]

The current significance of *Dennis*'s "grave and probable danger" test is minimal. One good way to measure the importance of a decision is by the number of times it has been cited. Using that test, *Dennis* appears at first glance to be a quite important case. As of October 3, 2008, Westlaw showed 3,430[43] different citing references[44] to it. Well over half of the time (a total of 1,738 times), however, these citations appeared in law review articles. These often had little or nothing to do with the "grave and probable danger" test.[45] There were 813 case citations to *Dennis*, but only 59 of these involved the "grave and probable danger" test. Just 40 of those were decided after *Brandenburg v. Ohio* (1969).[46]

That detail is significant, for in *Brandenburg* the Supreme Court adopted a much more speech-protective test than the one it had announced in *Dennis*.[47] The Court held in *Brandenburg* that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[48] This formulation added an intent requirement that earlier versions of the "clear and present danger" test had not contained, and much more clearly than its predecessors demanded that the threatened harm be imminent. "Therefore, on a doctrinal level, it is puzzling," as Chemerinsky observes, "that the Court presented the *Brandenburg* test as if it followed from the *Dennis* formulation, rather than that it was a substantial expansion in the protection of speech."[49] But, without formally overruling *Dennis*, it essentially did so. Indeed, *Brandenburg* is "even more protective of freedom of expression than the [original] Holmes test."[50] It did not overrule *Dennis*.[51] But while *Dennis* remains technically alive, since 1969 it has been a mere shadow of the decision that dominated free speech law in the 1950s.

Only thirty-nine cases have cited it for its "grave and probable danger" test since *Brandenburg* was decided. Interestingly, a number of these are actually citations to the Court of Appeals opinion in which Learned Hand originally articulated the rule. They mention the Supreme Court only as having affirmed Hand's ruling.[52] Cases applying the "clear and present danger" test in the immediate aftermath of *Brandenburg* dealt with a wide variety of issues, many of them rather far removed from the one that gave rise to the "clear and present danger" test. Several, for example, involved campus rules concerning dress and grooming,[53] and one held that public nudity does not constitute indecent exposure.[54] The issue in another was the rights of a prisoner who was confined in state prison while awaiting trial.[55] Two cases arose out of disputes over the regulation of speakers on college

campuses.[56] In 1978, one federal district court in New York relied on *Dennis* in invalidating state prison guidelines governing review by corrections officials of mail received by inmates,[57] and another in California did so in holding impermissible ordinances requiring members of religious societies that wished to engage in solicitation to first obtain a permit.[58]

There is only one area, however, in which *Dennis* and its famous "grave and probable danger" test have continued to play a really significant role since *Brandenburg*: They have been extensively utilized to resolve conflicts between freedom of speech on the one hand and the right to a fair trial on the other. There have been approximately twenty cases of this type. The "grave and probable danger" test was first raised in such a context in 1973, when a newspaper publisher, trying successfully to compel a judge to annul and vacate an order restraining the news media from publishing names and photographs of witnesses in a murder trial, cited it in *Sun Company of San Bernardino v. Superior Court*.[59] On June 11, 1976, although it cited Judge Hand rather than the Supreme Court's *Dennis* ruling, an Ohio court employed the "grave and probable danger" test in ruling that the press could not be excluded from a criminal trial.[60] These decisions were precursors to the news media's big victory in *Nebraska Press Association v. Stuart*.[61] In that case, a state judge, in anticipation of a trial for multiple murders that had attracted widespread news coverage, entered an order that (as modified by the Nebraska Supreme Court) restrained the news media from publishing or broadcasting accounts of confessions or admissions made by the defendant and other facts strongly implicating him. The U.S. Supreme Court overturned his action, quoting and clearly relying on Hand's *Dennis* opinion and the rule it had announced.[62]

Nebraska Press Association seemed to portend great things for *Dennis*. It led to a bevy of decisions in cases that used the balancing approach of the "grave and probable danger" test to resolve conflicts between the right to a fair trial on the one hand and the right to freedom of expression on the other. When the media was a party in one of these cases, it seems to have lost slightly more often than it won. Not all of these cases involved the classic conflict between the First Amendment rights of the media on the one hand and the fair trial rights of a criminal defendant on the other, however. A surprisingly large number arose out of civil litigation.[63] In one criminal case, it was the defendant himself who had been held in contempt for a statement that he had made,[64] and in another the defendant was fighting efforts by the government to force him to take down a Web site containing information about his case.[65]

Constitutional law scholars John Nowak and Ronald Rotunda thought that the Supreme Court's application of the "grave and probable danger" test to these contempt-of-court cases indicated that perhaps the Supreme Court intended to employ a modernized version of the "clear and present danger" standard as a general test for determining the constitutionality of all restrictions on freedom of speech.[66] But that was a misreading of its intentions. Whatever the Court may have had in mind, "outside the contempt of court cases, different tests had to be developed to evaluate the competing interests where governmental restraints are placed on different types of speech."[67] *Dennis* remained largely trapped in this backwater of First Amendment jurisprudence. It is still significant in cases pitting freedom of expression against fair trial rights. But outside this one small area, *Dennis v. United States* has been for decades basically a corpse. The Supreme Court has simply ignored its formulation of what kind of speech may be punished and what kind is protected.[68]

Yet, despite the fact that legally it is little more than a discredited relic, historians continue to treat *Dennis* as if it were of great importance. It seems to matter to them, even though it does not to most lawyers. The obvious question is, why? This is not one of those decisions that, like *Schenck*, although

The reason constitutional historians continue to treat *Dennis* as a landmark decision even though it has become largely irrelevant legally is that it exemplifies so well an important (if unfortunate) era in American history—McCarthyism. The era is pejoratively named after Wisconsin Senator Joseph P. McCarthy (pictured), who exploited the virulent anticommunism that gripped America around 1950 for his own political ends.

outmoded, retains significance because it is one of the building blocks of modern constitutional law. It is simply an old mistake (and a bad one at that), which the Supreme Court long ago rectified.

The reason constitutional historians continue to treat as important a decision that has become largely irrelevant legally is that it exemplifies so well an important (if unfortunate) era in American history. *Dennis v. United States* illustrates better than any other case the impact on the law of the virulent anticommunism that gripped America around 1950. Usually referred to pejoratively as "McCarthyism," this phenomenon takes its name from the demagogic Senator Joseph R. McCarthy, (R.-Wis.), who so effectively exploited the passions of the period to advance himself politically. But McCarthyism "encompassed much more than the career of the Wisconsin senator who gave it a name."[69] This sweeping, indiscriminate assault on radicals, liberals, and civil liberties was, as Ellen Schrecker explains, "the most widespread and longest lasting wave of political repression in American history."[70] Bent on eliminating what they perceived as the threat of domestic Communism, a broad coalition of politicians, bureaucrats, and other activists "hounded an entire generation of radicals and their associates"[71] with loyalty oaths, blacklists, and even criminal prosecution. Anticommunism became "the dominant theme in American politics,"[72] drastically narrowing "the spectrum of acceptable political debate."[73] One reason McCarthyism reached the extremes that it did, as Richard Fried has pointed out, is "the nation's underdeveloped appreciation of the importance of civil liberties for repudiated minorities."[74] Nothing better illustrates America's lack of commitment during the McCarthy era to safeguarding the rights of the unpopular than does *Dennis v. United States* and the legal war on the Communist party that it unleashed.

Although nurtured by an inadequate commitment to the preservation of constitutional rights, that attack was not as irrational as it once appeared to be. Students of *Dennis*, such

as Peter L. Steinberg[75] and myself,[76] have portrayed the case as the product of a politically motivated prosecution. The implication, of course, was that the leaders of the CPUSA were simply innocent victims of a repressive government. Students of the broader phenomenon of McCarthyism, such as Fried and Schrecker, have viewed *Dennis* the same way. In Fried's opinion, "[t]he case served justice badly. The government sought less to convict the Eleven than to proscribe their Party."[77] Schrecker charges that *Dennis* "shows how valuable the demonized image of Communism was in Washington's campaign to destroy the Communist party."[78]

Recent research reveals that the CPUSA was more of a demon than we thought it was. The collapse of the Soviet Union opened up to Western researchers some documents that are rather revealing concerning the relationship between the Communist party of the United States and America's Cold War enemy. So are the messages that were intercepted and decoded by the National Security Agency (NSA)'s highly classified Venona Project, which between 1944 and 1980 intercepted and deciphered hundreds of Soviet diplomatic cables passing information from intelligence officers in the United States to their superiors in Moscow.

Released to the public between 1995 and 1997, these messages depict an American Communist party that maintained a close and far from innocent relationship with Moscow.[79] They "confirm ... that the Soviets exercised considerable control over the CPUSA."[80] This went far beyond the sort of ideological influence that was apparent to earlier researchers, such as Steinberg and myself.[81] For one thing, "the CPUSA received generous Soviet subsidies."[82] Money, much of it from Moscow, helped to cement the loyalty of the American Communist party to the USSR. Most CPUSA cadre received salaries, paid with money that came from the Russian party or one of its affiliates. These Soviet subsidies helped ensure a loyalty to the USSR that was economic as well as psychological. They tied personal financial security to commitment to Moscow, making it unlikely that an American cadre would break with a party organization controlled by the USSR.[83] That organization clearly took orders as well as money from abroad. "The Communist International sent thousands of written instructions to the Communist Party of the United States."[84] American Communists did not always do exactly what the Comintern wanted, but when they failed to follow instructions, the reason was never insubordination; it was just inability to comply.[85] Researchers Harvey Klehr, John Earl Haynes, and Kyrill M. Anderson found "no documents in the Soviet archives [or] in the records of the Communist International or in those of the CPUSA that show American Communist leaders refusing to carry out Comintern orders as a matter of principle ... Instead, the archives contain unqualified assertions of American Communist loyalty to the 'first land of socialism.'"[86] Not just in the early days of communism in the United States but also in the 1930s, documents show, "Moscow decided how the American Communist movement would be run in matters of policy, organization, and choice of personnel."[87] Not surprisingly, the Comintern guided the overarching strategy of the American party. But documents viewed by Klehr, Haynes, and Anderson disclose that it also micromanaged the business of the CPUSA, going so far as to select leaders, reschedule conventions, and order disciplinary action against leaders of the American party whose personal habits Moscow deemed unacceptable.[88] Soviet dictator Joseph Stalin himself intervened in the business of the CPUSA, playing a role in the process that led to the removal of Earl Browder from leadership of the American Communist party in 1945.[89]

Stalin's interest in Browder was understandable, for the man who headed the CPUSA from 1932 to 1945 was deeply involved in espionage for the USSR. He served as a sort of talent scout for the NKGB and the GRU (Soviet military intelligence), recommending "illegal" members of the American party for agent work.[90] "Illegals" were Communists

The collapse of the Soviet Union opened up to Western researchers some documents that have revealed that the top cadres in the Communist party of the United States received financial aid from Moscow to help solidify their loyalty to the USSR.

who belonged to the party's secret apparatus, maintaining contact with the CPUSA through clandestine caucuses comprised of government employees. They helped the Comintern with international operations and also assisted Soviet intelligence agencies with espionage.[91] Whittaker Chambers later identified thirteen of these individuals, among them Alger Hiss, as having been involved in spying for the USSR.[92] Hiss always denied he had committed espionage for the Soviet Union,[93] but the Venona decryptions confirm Chambers' allegations against him, as well as those against seven other individuals whom he identified as Russian spies.[94] Other government employees not named by Chambers also collected intelligence for the USSR. For example, Soviet archives disclose that Morris Cohen, a physicist who worked on the Manhattan Project helping to build America's first atomic bomb, and his wife both spied for the Soviet Union. So did other members of the CPUSA's secret apparatus.[95] Among the Venona intercepts are forty-nine messages that settle once and for

all the dispute about whether Julius Rosenberg was a Soviet spy; these messages establish clearly that he was.[96]

This spying made the CPUSA a threat to the national security of the United States. It was not, as Justice William O. Douglas insisted in his *Dennis* dissent, a "mere bogy-man."[97] But how big a threat was it? Browder's role in Soviet intelligence and his knowledge of covert activities were uncommon among leaders and ordinary members of the CPUSA.[98] Chambers was recruited to serve as a spy for the New York station chief of the GRU by Max Bedacht, a CPUSA official.[99] But that seems to have been exceptional. Only a handful of American Communists served as Soviet sources, couriers, and group handlers, and according to Alan Weinstein and Alexander Vassiliev, virtually all of them, except for those involved in atomic espionage, were hand-picked by Browder himself.[100]

That is ironic, for by the time of the Smith Act indictments in July 1948, Browder was no longer a leader of the CPUSA. The reason he was not is hugely ironic. He had been displaced from leadership of the American Communist movement in June 1945, still more ironically for failing to follow the latest twist in the Russian ideological line. In 1944, seeking to promote American support for the embattled Soviet Union in World War II, Browder had brought about the dissolution of the CPUSA and its replacement with a "Communist Political Association." The new organization promoted a policy of cooperation between American Communists and all democratic forces in the United States—within a capitalist framework. In 1945, however, with the end of the war in Europe approaching, French Communist leader Jacques Duclos, who was understood by American Communists to be speaking for Stalin, published an article denouncing this accommodationist approach. The rest of the national leadership demanded that Browder accept Duclos's criticism of the direction in which he had taken their organization. Browder (the secret Soviet agent) refused to join his comrades in this Soviet-inspired condemnation of his "revisionism." They excluded him from the leadership of a reconstituted Communist party, which within a year expelled him.[101]

Thus, Browder, the American Communist who had been the most deeply involved in covert activities on behalf of the USSR, was no longer a member, let alone a recognized leader, of the CPUSA when the government indicted the party's National Board in July 1948 for conspiracy to violate the Smith Act.[102] Nevertheless, Geoffrey Stone, although quite critical of the *Dennis* prosecution, acknowledges: "There was a conspiracy, it did involve leaders of the CPUSA, it did have links with international communism, and it did involve espionage against the government of the United States."[103] The problem, as Stone sees it, is that the *Dennis* defendants were not charged with any of these things. Rather, the government accused them of conspiring to teach and advocate Communist doctrine. In his opinion, "to the extent there was criminal conduct, the individuals who engaged in such conduct should have been investigated and prosecuted for their crimes. That," however, Stone insists, "is quite different from prosecuting other people—the defendants in *Dennis*—for their advocacy of Marxist-Leninist doctrine."[104]

Neither that doctrine nor the leaders of the organization that championed it posed a threat to the United States. The closest thing to evidence that they did was a Venona intercept that shows that Eugene Dennis was in contact with a group of concealed Communists in the Office of Strategic Services and the Office of War Information.[105] Even if he was engaging in some kind of clandestine communication with government employees, that did not make the doctrines he espoused in public any more dangerous than they otherwise would have been. Dennis and his co-defendants were not charged with conspiring to engage in espionage or revolutionary action, but rather with conspiring to teach and advocate the violent overthrow of the government. The principal evidence against them was five books: Marx and Engel's **The Communist Manifesto** (1848), Lenin's **State and Revolution**

(1918), Stalin's **Fundamentals of Leninism** (1929) and **The History of the Communist Party of the Soviet Union (Bolsheviks)** (1925), and **The Program of the Communist International** (1928).[106] Besides being rather old, these were available in most good college libraries. George Kneip, a Justice Department lawyer who analyzed a massive brief on the Communist party assembled by the FBI, advised the U.S. Attorney for the Southern District of New York that the government "would be faced with a difficult task in seeking to prove beyond a reasonable doubt that the Communist Party advocates revolution by violence."[107] As Stone observes: "The notion that the government would be helpless to combat a truly dangerous conspiracy if it could not suppress its public expression is simply absurd."[108] In his opinion, "the defendants were prosecuted for their speech because they could not have been successfully prosecuted for their actions or for any danger they actually presented to the United States."[109] Even historian Allen Weinstein, a student of Soviet espionage in America, considers the *Dennis* prosecution "senseless."[110]

But *Dennis* was not an isolated incident. This senseless prosecution of the leaders of the CPUSA for their ideas rather than their actions was a small part of a much broader phenomenon. "With the Cold War at its height and fears of domestic subversion rampant," as legal historian Michael Klarman has pointed out, "communists were perceived to be simply too dangerous to warrant First Amendment protection."[111] The country faced a real and dangerous enemy in the Soviet Union, and "assumptions—about the critical nature of the world situation and the alien nature of Communism—enabled most Americans to view the repressive measures taken against alleged Communists as necessary for the survival of the United States."[112] It was not just the leaders of the CPUSA who were the victims of this distorted perception. "The political chill that settled over the United States during the late 1940s and 1950s made many Americans hesitate to criticize the government."[113] That, of course, is what McCarthyism was all about. Virtually the entire nation was eventually overcome by a virulent and far-reaching Red Scare.[114]

There was far more to what Fried has characterized as America's "nightmare in red"[115] than just the *Dennis* case. But "*Dennis* was decided in 1951, when McCarthyism was at its peak."[116] The "grave and probable" danger test that the Supreme Court used to justify the largely unjustifiable prosecution of a handful of Communist leaders for their harmless teaching and advocacy has now largely fallen into desuetude. But while the test is no longer important, memories of its effects on Cold War America persist. Although destined to have a short legal shelf life, it fit perfectly the era that engendered it.

As Klarman observes, "Today most people believe the ... Court made a grievous error when it failed to stand up for freedom of expression and association" in *Dennis*.[117] But this was, he insists, an understandable error. Klarman questions whether it is realistic to expect that in 1951 the Court could have decided civil-liberties cases in any more positive manner.[118] *Dennis* was a particularly egregious example of a pervasive phenomenon. But it is also a very important example of that phenomenon. As Schrecker, the author of the best general study of McCarthyism, emphasizes, "by effectively placing Communism outside the Constitution and making the day-to-day activities of the [Communist party's] leaders against the law, the successful invocation of the Smith Act made all other forms of repression against Communists, ex-Communists, and alleged Communists that much easier."[119] As Hall emphasized in exemplifying the impact of the Cold War on civil liberties with excerpts from my book about *Dennis*, "[t]he federal government's invocation of the Smith Act posed one of the central issues of the Cold War: what was the scope of civil liberty."[120] Very limited, it showed.

That powerful demonstration of the essence of an era makes the Communist case, however inconsequential it may now seem to

lawyers, very important to historians. To them, like *Lochner v. New York*,[121] it represents an important, if extremely unfortunate, stage in American legal history. That is enough to make *Dennis v. United States* truly a landmark case.

ENDNOTES

[1]341 U.S. 494 (1951).

[2]Michal R. Belknap, "The Smith Act and the Communist Party: A Study in Political Justice" (Ph.D. dissertation, University of Wisconsin, 1973).

[3]Michal R. Belknap, **Cold War Political Justice: The Smith Act, the Communist Party, and American Civil Liberties** (1977).

[4]Michal R. Belknap, "Cold War in the Courtroom: The Foley Square Smith Act Trial," in **American Political Trials** 233 (Michal R. Belknap, ed. 1981). A revised and expanded edition of this book, containing a somewhat revised version of the essay on *Dennis*, appeared in 1994. See Michal R. Belknap, ed., **American Political Trials** (rev. ed. 1994).

[5]Michal R. Belknap, "*Dennis v. United States*: Great Case or Cold War Relic?" 1993 *Journal of Supreme Court History* 39.

[6]William Wiecek, **The Birth of the Modern Constitution: The United States Supreme Court, 1941–1953** (vol. XII of the **Oliver Wendell Holmes Devise History of the Supreme Court of the United States**) 535–78 (2006).

[7]Melvin I. Urofsky and Paul Finkelman, **A March of Liberty: A Constitutional History of the United States**, vol. II, **From 1877 to the Present** 758–63 (2d ed. 2002).

[8]Michael Les Benedict, **The Blessings of Liberty: A Concise History of the Constitution of the United States** 299–300 (2d ed. 2006).

[9]Melvin I. Urofsky and Paul Finkelman, **Documents of American Constitutional and Legal History**, vol. II, **From the Age of Industrialization to the Present** 718–22 (2d ed. 2002).

[10]Paul Finkelman, James W. Ely, Jr., and Kermit Hall, **American Legal History: Cases and Materials** 535–38 (3rd ed. 2005).

[11]Kermit Hall, **Major Problems in American Constitutional History** 241–89 (1992).

[12]Wiecek, *supra* note 6, at 403.

[13]Harry Kalven, Jr., **A Worthy Tradition: Freedom of Speech in America** 190 (1988).

[14]Belknap, **Cold War Political Justice**, *supra* note 3, at 48–53.

[15]Alien Registration Act of 1940, 54 Stat. 640 (1940).

[16]Belknap, **Cold War Political Justice**, *supra* note 3, at 77–112. One of the twelve men originally indicted did not stand trial with the others. The case of William Z. Foster was severed from that of his co-defendants because a severe heart condition had supposedly rendered him too ill to handle the rigors of a trial. *Id.* at 70.

[17]*United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950).

[18]341 U.S. 494 (1951).

[19]Associate Justice Tom Clark did not participate because he had been the Attorney General at the time that the Justice Department initiated the prosecution.

[20]Chief Justice Fred Vinson's opinion had the support of only three other members of the majority. Associate Justices Felix Frankfurter and Robert Jackson filed concurring opinions that relied on entirely different lines of reasoning.

[21]Belknap, **Cold War Political Justice**, *supra* note 3, at 156.

[22]354 U.S. 298 (1957).

[23]Michal R. Belknap, **The Supreme Court Under Earl Warren, 1953–1969** 63 (2005).

[24]Confidential Memorandum for Msrs. Bator and Schlei, July 8, 1956, Box 483, John Marshall Harlan Papers, Mudd Library, Princeton, New Jersey.

[25]Belknap, **Cold War Political Justice**, *supra* note 3, at 248. The Court declared that the Smith Act did not prohibit advocacy and teaching of the violent overthrow of the government as an abstract principle, divorced from any effort to instigate action to that end. The distinction was between advocacy of abstract doctrine, which it did not prohibit, and "advocacy directed at promoting unlawful action," which it did. The latter is what must be proved in a Smith Act case. 354 U.S. at 319.

[26]354 U.S. at 310–12. The Court declared, "We conclude ... that since the Communist Party came into being in 1945, and the indictment was not returned until 1951, the three-year statute of limitations had run on the 'organizing' charge and required the withdrawal of that part of the indictment from the jury's consideration." *Id.* at 312.

[27]Belknap, **Cold War Political Justice**, *supra* note 3, at 189–90.

[28]John Williamson, **Dangerous Scot: The Life and Work of an American Undesirable** 172 (1969).

[29]Belknap, **Cold War Political Justice**, *supra* note 3, at 190–92.

[30]J. Edgar Hoover, **Masters of Deceit: The Story of Communism in America and How to Fight It** 178 (1958).

[31]Belknap, **Cold War Political Justice**, *supra* note 3, at 192.

[32]*Id.*

[33]*Id.* at 193–95.

[34]*Id.* at 196–97.

[35]*Id.* at 190, 197.

[36]Geoffrey R. Stone, **Perilous Times: Free Speech in Wartime** 410 (2004).

[37]Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, Mark V. Tushnet & Pamela Karlan, **Constitutional Law** (6th ed. Aspen 2009).

[38]*See* Erwin Chemerinsky, **Constitutional Law: Principles and Policies** 990–93 (3rd ed. 2006).

[39]*Dennis v. United States*, 341 U.S. 494, 510 (1941).

[40]Chemerinsky, *supra* note 38, *at* 995.

[41]*Id.* As my California Western colleague, Laurence Benner, has insisted to me, this statement is not entirely accurate. A very great evil may reduce the required likelihood of harm to a minimal, even microscopic, level. But it does not get rid of it entirely. This is a balancing test, and there must be *something* against which to balance the harm. Also, even if the gravity of the evil may eliminate the need that it be likely, likelihood and imminence are not the same thing. Something can be certain to occur and still not be imminent. The converse is, of course, impossible (something cannot be about to happen that is never going to happen at all), but Chemerinsky does add an element that the Hand formula fails to address specifically. The root of the problem lies with Hand, not Chemerinsky. Hand's formula really addresses only gravity and probability, while ignoring the imminence requirement that looms large in other formulations of the "clear and present danger" test.

[42]Francis D. Wormuth, "Learned Legerdemain: A Grave but Implausible Hand," 6 *Western Political Quarterly* 543, 548 (1953). As Wormuth sees it, Hand's position was that "speech which raises a grave and probable danger may be punished even though the danger is remote in time." *Id.* His rendering of the judge's position is somewhat lacking in precision. Really, what Hand created was a "grave *or* probable danger" test, since under his formulation, if the gravity of the harm is great enough, the probability can be nearly nonexistent.

[43]These and the other statistics in this paragraph were compiled by my research assistant at California Western School of Law, Jane Krikorian, and California Western School of Law Research librarians Brandon Baker and Ian Kippenes, with the help of several research attorneys at Westlaw. I would like to express my gratitude to all of them for their help.

[44]Citing references include cases, administrative materials, secondary sources, briefs and other court materials.

[45]*See, e.g.,* "'Under the Influence:' Pornography and Alcohol—Some Common Themes," 29 *Akron L. Rev.* 35, 46 (1995); "How Would Justice Hugo Black Have Written *Brown v. Board of Education*," 56 Ala. L. Rev. 851, 853–54 (2005); "Hamdi Meets Youngstown: Justice Jackson's Wartime Security Jurisprudence and the Detention of Enemy Combatants," 68 *Alb. L.Rev.* 1127, 1144 (2005); "Rust in the Laboratory: When Science Is Censored," 58 *Alb. L. Rev.* 299, 345 (1994); "Criminal Liability for Document Shredding after Arthur Anderson, LLP," 43 Am. Bus. *L.J.* 647, 688 (2006); "A Road Map to Understanding Export Controls: National Security in a Changing Environment," 30 *Am. Bus. L.J.* 607, 675 (1993); "Murder in Massachusetts: The Criminal Discovery Rule from Snelling to Rule 14," 40 *Am. J. Legal Hist.* 438, 449 (1996); "Up in Smoke: Online Privacy Becomes the Latest Casualty in the War on Drugs," 27 *Am. J. Trial Advoc.* 169, 196 (2003); "On Statutory Rape, Strict Liability and the Public Welfare Offense Model," 53 *Am. U. L. Rev.* 313, 385 (2003); "The Proposed New Columbia Constitution: Creating a 'Manacled State,'" 32 *Am. U. L. Rev.* 635, 716 (1983); "What the Supreme Court Isn't Saying About Federalism, the Ninth Amendment, and Medical Marijuana," 59 *Ark. L. Rev.* 755, 779 (2006); "Can Reasonable Doubt Have an Unreasonable Price? Limitations on Attorney's Fees in Criminal Cases," 41 B.C. L. Rev. 1, 70 (1999); "Tension between the National Security Law and Constitutionalism in South Korea: Security for What?" 15 *B.U. Int'l. L.J.* 125, 174 (1997); "Spinning, Squirreling, Shelling, Stiletting and Other Stratagems of the Supremes," 35 *Ariz. Law Rev.* 503, 533 (1993).

[46]395 U.S. 444 (1969).

[47]David Cole, "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis," 101 *Mich. L. Rev.* 2565, 2573 (2003).

[48]395 U.S. at 447.

[49]Chemerinsky, *supra* note 38, at 999.

[50]Bernard Schwartz, "Holmes versus Hand: Clear and Present Danger or Advocacy of Unlawful Action," 1994 *Sup. Ct. Rev.* 209, 240.

[51]In a concurring opinion, Justice Douglas argued for elimination not only of the *Dennis* reformulation but of the entire "clear and present danger" test. *See* 395 U.S. at 454. He obviously believed that both survived *Brandenburg.*

[52]*See, e.g., In re Matter Entitled State v. Spillers*, 813 So. 2d 1184, 1186 (La. App. 3d Cir. 2002); *In re A Minor*, 127 Ill. 2d 247, 266, 537 N.E. 2d 292, 300, 130 Ill. Dec. 225, 233 (1989); *U.S. v. Smith*, 555 F.2d 249, 253 (9th Cir. 1977); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976). In addition, a judge on the United States Court of Appeals for the Armed Forces, after quoting Hand's opinion, stated erroneously that Hand was quoting the Supreme Court's *Dennis* opinion, rather than the other way around. *U.S. v. Wilcox*, 66 M.J. 442, 458 (2008) (Baker, J., dissenting).

[53]*Sherling v. Townley*, 464 F.2d 587 (5th Cir. 1972); *Montalvo v. Madera Unified Sch. Dist. Bd. of Education*, 21 Cal. App. 3d 323, 98 Cal. Rptr. 593, (Cal. App. 5th Dist. 1971); *Hatter v. Los Angeles City High School Dist.*, 310 F.Supp. 1309 (C.C.Cal. 1970); *Stevenson v. Wheeler County Bd. of Ed.*, 306 F.Supp. 97 (S.D. Ga. 1969).

[54]*State v. Nelson*, 178 N.W.2d 434 (Iowa 1970).

[55]*Conklin v. Hancock*, 334 F.Supp. 1119 (D.N.H. 1971).

[56]*Molpus v. Fortune*, 311 F.Supp. 240 (N.D. Miss. 1970); *Stacy v. Williams*, 306 F.Supp. 963 (N.D. Miss. 1969).

[57]*Jackson v. Ward*, 458 F. Supp. 546 (W.D.N.Y. 1978).

[58]*International Society for Krishna Consciousness of Berkeley, Inc. v. Kearnes,* 454 F.Supp. 116 (E.D. Cal. 1978).

[59]29 Cal. App. 3d 815, 105 Cal. 873 (Cal. App. 4th Dist. 1973).

[60]*State ex. rel. Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St. 2d 457, 351 N.E. 2d 127, 75 O.O.2d 511 (1976).

[61]427 U.S. 539 (1976).

[62]427 U.S. at 562.

[63]*See Koch v. Koch Industries, Inc.*, 2 F. Supp.2d 1409 (D.Kan. 1998); *Keene Corp. v. Abate*, 92 Md. App. 362, 608 A.2d 811 (1992); *Bailey v. Systems Innovation, Inc.*, 852 F.2d 93 (3d Cir. 1988); *Husky v. National Broadcasting Co., Inc.*, 632 F.Supp. 1282 (N.D.Ill. 1986).

[64]*U.S. v. Smith*, 555 F.2d 249 (9th Cir. 1977).

[65]*U.S. v. Carmichael*, 326 F.Supp.2d 1267 (M.D. Ala. 2004).

[66]John E. Nowak and Ronald D. Rotunda, **Constitutional Law** 962 (4th ed. 1991). The precise quotation found here does not appear in later editions of the book, but what the authors have to say is essentially the same.

[67]*Id.* at 963.

[68]Wiecek, *supra* note 6, at 567.

[69]Ellen Schrecker, **Many Are the Crimes: McCarthyism in America** x (1998).

[70]*Id.*

[71]*Id.*

[72]Richard Fried, **Nightmare in Red: The McCarthy Era in Perspective** 8 (1990).

[73]Schrecker, *supra* note 69, at x.

[74]Fried, *supra* note 72, at 9.

[75]*See* Peter L. Steinberg, **The Great "Red Menace": United States Prosecution of American Communists, 1947–1952** ix–xiv, 87–114 (1984).

[76]*See* Belknap, **Cold War Political Justice**, *supra* note 3, at 3–7, 25–53.

[77]Fried, *supra* note 72, at 94.

[78]Schrecker, *supra* note 69, at 190.

[79]John Earl Haynes and Harvey Klehr, **Venona: Decoding Soviet Espionage in America** 3–6, 8–9 (1999).

[80]Stone, *supra* note 36, at 409.

[81]*See, e.g.*, Steinberg, *supra* note 75 at 62–63, 66–67, 75, 79–90, 267; Belknap, **Cold War Political Justice**, *supra* note 3, at 23, 37, 38, 43–44, 156, 205–6. Indeed, John Earl Haynes and Harvey Klehr, who have since published translations of some of the Venona intercepts, wrote in 1992: "The party promoted communism and the interests of the Soviet Union through political means; espionage was the business of the Soviet Union's intelligence services. To see the American Communist party chiefly as an instrument of espionage or a sort of fifth column misjudges its main purpose." **The American Communist Movement: Storming Heaven Itself** 108 (1992).

[82]Harvey Klehr, John Earl Haynes, and Kyrill M. Anderson, **The Soviet World of American Communism** 274 (1998).

[83]*Id.* at 162–63.

[84]*Id.* at 14.

[85]*Id.*

[86]*Id.*

[87]*Id.*

[88]*Id.*

[89]Alan Weinstein and Alexander Vassiliev, **The Haunted Wood: Soviet Espionage in America—The Stalin Era** 305 (1990).

[90]*Id.*; Klehr, et al., *supra* note 82, at 234.

[91]Haynes and Klehr, *supra* note 79, at 93.

[92]*Id.* at 90–91.

[93]G. Edward White, **Alger Hiss's Looking-Glass Wars: The Covert Life of a Soviet Spy** xvi (2004). "From the moment that Whittaker Chambers accused him of being a Communist, and subsequently becoming an agent for Soviet military intelligence, Alger Hiss strenuously and persistently denied being either, and made extensive efforts to enlist the public in support of his claims of innocence." *Id.*

[94]Haynes and Klehr, *supra* note 79, at 90.

[95]Klehr, et al., *supra* note 82, at 217–18.

[96]Haynes and Klehr, *supra* note 79, at 6.

[97]341 U.S. at 588.

[98]Weinstein and Vassiliev, *supra* note 89, at 304.

[99]*Id.* at 43.

[100]*Id.* at 304. Haynes and Klehr would seem to put the number much higher, but while they say the Venona intercepts identify 354 American citizens, immigrants, and resident aliens as having covert relationships with Soviet intelligence agencies, they are not nearly as specific about how many of these were Communist party members. *See* Haynes and Klehr, *supra* note 79, at 9.

[101]Steinberg, *supra* note 75, at 64–66.

[102]Belknap, *supra* note 3, at 51. The indictment did accuse the members of the National Board of conspiring not only with each other but also with unknown other persons to organize the Communist party of the United States. It alleged that this conspiracy had begun on or about April 1, 1945, and since Browder was still a member of the party at that time, and was not even excluded from a leadership role until July, he could have been considered one of those others. Steinberg, *supra* note 75, at 65–66. It would, however, be the height of absurdity to consider him a participant in a "conspiracy" the whole purpose of which was now to repudiate his leadership and the direction in which he had been taking the organization.

[103]Stone, *supra* note 36, at 410.

[104]*Id.*

[105]Haynes and Klehr, *supra* note 79, at 346. The Office of Strategic Services (OSS) was the World War II ancestor of

the CIA. It handled classified information, access to which was restricted. The Office of War Information, on the other hand, was essentially a government information agency. Its *business* was to tell people what the American government was doing. Standing alone, a report that someone was in contact with people employed by both agencies proves very little, especially as the OSS itself sometimes recruited people with radical political backgrounds because of their contacts in occupied Europe.

[106]Belknap, *supra* note 3, at 82–83.

[107]George F. Kneip, "The Communist Party of the United States" (unpublished memorandum), Box 1, John F.X. McGohey manuscripts, Harry S. Truman Library, Independence, Missouri.

[108]Stone, *supra* note 36, at 409.

[109]*Id.* at 408.

[110]Weinstein and Vasiliev, *supra* note 89, at 309.

[111]Michael Klarman, "Rethinking the Civil Rights and Civil Liberties Revolutions," 108 *Va. L. Rev.* 1, 29 (1996).

[112]Schrecker, *supra* note 69, at xiv.

[113]*Id.* at xiii.

[114]*See* Klarman, *supra* note 111, at 30.

[115]This is the title of Fried's 1990 survey of the McCarthy era. *See* Fried, *supra* note 72.

[116]Klarman, *supra* note 111, at 30.

[117]*Id.* at 29.

[118]*Id.* at 31.

[119]Schrecker, *supra* note 69, at 190–91.

[120]Hall, *supra* note 11, at 243.

[121]198 U.S. 45 (1905). *Lochner,* like the later *Dennis* case, is a decision that, although now repudiated, is universally regarded as an extremely important landmark in American constitutional history. *See generally* Paul Kens, **Judicial Power and Reform Politics: The Anatomy of Reform Politics** (1990) and Paul Kens, ***Lochner v. New York*: Economic Regulation on Trial** (1998). Indeed, Laurence Tribe, one of the leading authorities on constitutional law, refers to the entire period between 1905 and 1937 as "the *Lochner* era." Laurence Tribe, **American Constitutional Law** 1343–46 (3rd ed. 1988).

National League of Cities and the Ephemeral Nature of Significant Supreme Court Cases

EUGENE HICKOK

For many years, I taught third-year law students at the Dickinson School of Law (Penn State's law school now, a private institution then) a seminar entitled "The Constitution." For a semester we would seek to get to know the document through a careful reading of it, along with some of the works that those who wrote the Constitution would have read and some that they wrote, various essays by legal scholars and political scientists, and various Supreme Court cases. The goal was to get these budding young attorneys to try to determine what, if any, relationship there might be between what the Constitution says and what we now say it says.

We would typically begin with Article I and proceed through the Constitution, looking subsequently at the executive and then judicial articles. We would then consider certain constitutional principles, such as representation, equality, separation of powers, and so on. Gazing upon Congress's power to "regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes," I would ask my students what commerce is; what does the word "commerce" mean?

Now remember, these are budding lawyers, so nothing is as simple as it should be. Typically I would have to pull it out of them. Is commerce making something? Is commerce selling something? The Constitution says "among the several States;" what does that mean? All of the students had completed at least one course in constitutional law and would jump into the discussion, no doubt remembering some case that shaded their impression of the idea of Commerce among the several States. I would then ask them the following: I grow tomatoes and lettuce and cucumbers in my backyard garden every summer. I then pluck those tomatoes and cucumbers when ripe and harvest the lettuce and go to my kitchen and fix myself a garden salad. Am I engaged in commerce?

Student being students, law students being law students, you can imagine how the discussion usually proceeded. Do you put dressing

on the salad? If so, did you buy it at the grocery store? (No, I like my salads "naked.") Did you buy the tomato and cucumber and lettuce plants? The mind of a soon-to-be attorney is a marvelous thing, is it not?

In any event, after several tortuous minutes of such discussion I would say what some of the students already knew, sort of: that the Court years ago decided that growing such "produce" in my backyard for my personal consumption was an activity that could quite rightly be regulated by Congress through its exercise of the Commerce Clause of the Constitution. We then would consider one of my favorite cases, *Wickard v. Filburn*,[1] a case that I will bring up again later.

During another session, I would distribute a blank map of the United States, inform the students that this was a pop quiz, and challenge them to identify the states. You can imagine the reaction. They may have never encountered such a thing as a pop quiz in the entirety of the postsecondary experience or ever. But seeing that I was serious, they would begin their assignment. Typically, the states along the seaboards were a cinch, as were the big states, such as Texas. But invariably the students would run aground in the middle of America. Nebraska and Kansas, Colorado and Wyoming. Where's Utah? No, that's Idaho. You can imagine.

After a few tortuous minutes, with no single student, ever, being able to complete the assignment successfully, I would offer a compromise: teams of three working together, but now you must identify the state capitals, as well. Moans. No, Las Vegas is not the capital of Nevada. No, it's not Joplin, Missouri, or Albuquerque, New Mexico.

Putting their maps aside, I would ask my students a deceptively simple question: why states? They would mumble something about the need for subunits of government to manage public policy and affairs. I would counter that that is an argument for subunits of government, not for states. Pointing to the place in America where four states touch one another—the Four Corners of Colorado, Utah, New Mexico, and Arizona—where one can quite literally put four appendages in four different states at the same time, I would assert that drawing state boundaries was a somewhat arbitrary exercise and perhaps an outdated idea, and would ask one more time: Why states? We would then launch into a discussion of a constitutional principle that is almost foreign to many who toil in today's law schools: federalism.

The case I have been asked to explore tonight, *National League of Cities v. Usery*,[2] fits nicely into those long conversations with my law students on the meaning of Congress's Commerce Clause authority, federalism, and how both ideas have evolved over time. Handed down in 1976, it was a 5–4 decision. The majority opinion was written by Justice William H. Rehnquist, with Chief Justice Warren Burger and Justices Potter Stewart, Harry A. Blackmun, and Lewis F. Powell joining. Justice Blackmun wrote a brief concurring opinion. Justice William J. Brennan, Jr., wrote a rather heated dissent, joined by Justices Byron R. White and Thurgood Marshall. Justice John Paul Stevens filed a dissenting opinion.

National League of Cities seems an appropriate case to illustrate the "ephemeral" nature of some of the Court's significant cases because, although it overruled precedent set in *Maryland v. Wirtz*,[3] *National League of Cities* itself was overturned only a few years later by *Garcia v. San Antonio Transit Authority*.[4] Some of the questions and issues raised in these cases remain central to the discussion of Congress's commerce power, the authority of the states in our federal system of government, and how those two ideas work themselves out under our Constitution. Indeed, such issues were raised by members of the Senate during the confirmation hearings for Chief Justice John G. Roberts and Associate Justice Samuel Alito. Members of the Senate, jealous of their Commerce Clause authority, wanted to know whether the nominees might begin to cut back on Congress's commerce power: I recall

Secretary of Labor Frances Perkins (pictured) signed the Fair Labor Standards Act in 1938, mandating minimum wage and overtime pay to employees. The Act did not, however, apply to employees of state and local governments.

that Senator Arlen Specter wondered aloud, "Is *Wickard v. Filburn* still good constitutional law?"

"Ephemeral" means transitory, changing, shifting. I think it is safe to say that much of what passes for constitutional law is just that: transitory, changing, shifting, even though the Court and our legal system certainly embrace the importance of *stare decisis*, or precedent. Certainly this is true regarding the Court's understanding of the Commerce Clause and federalism, both of which have evolved over time. There are reasons for this, which I will go into toward the end of my presentation. For now, let's take a look at *National League of Cities v. Usery*.

When passed by Congress and signed into law in 1938, the Fair Labor Standards Act (FLSA) specifically excluded states and their political subdivisions from its coverage. FLSA required employers covered by its provisions to pay employees minimum hourly wages, with time and a half for overtime. These were almost exclusively private-sector employers. The Supreme Court upheld the FLSA as an exercise of Congress's Commerce Clause power under the Constitution in *United States v. Darby*, in 1941.[5] In that case, the Court said

> Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause.

In the 1960s, Congress began to extend the reach of FLSA to certain public employers: that is, to persons who were employed in "enterprise" engaged in commerce or the production of goods for commerce. In 1966, Congress removed previous exemptions that

had been extended to the states and their political subdivisions with respect to state hospitals, institutions, and schools. The Supreme Court upheld the changes in *Maryland v. Wirtz*.

In 1974, Congress sought again to broaden the coverage under FLSA to include "a public agency." To accomplish this, Congress employed language asserting that "enterprises engaged in commerce or in the production of goods for commerce" encompassed "an activity of a public agency." Indeed, Congress simply determined that public agencies are engaged in commerce, by definition, and are therefore subject to FLSA.

> The employees of an enterprise which is a public agency shall *for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.*[6]

Put another way, Congress seemed determined to make state and local governments adhere to FLSA's minimum-wage and maximum-hour provisions, and therefore it simply proclaimed that they were engaged in commerce and thus subject to Congress's Commerce Clause authority. Congress did retain the existing general exemptions for executive, professional, and administrative personnel and those holding elected office. With these changes, Congress imposed upon almost all of public employment the minimum-wage and maximum-hour restrictions that had previously been restricted to private employers of employees engaged in interstate commerce, with only modest exemptions for employers without a private-sector counterpart, such as fire protection and law enforcement.

As one might imagine, a number of states, local governments, and state and local governing associations, among them the National Governors Association and the National League of Cities, brought suit challenging the validity of the 1974 amendments. Interestingly, they did not challenge the plenary power of Congress under the Commerce Clause. Rather, they argued that Congress "infringed a constitutional prohibition" running in favor of the states and that the constitutional doctrine of sovereign immunity prevented Congress from exercising authority in the manner it chose with the amendments. For the states, Congress's commerce power was limited by the sovereign immunity of the states. When states were acting as states—engaged in performing essential governmental functions—they could not be regulated by the Commerce Clause.

The district court sided with the U.S. Secretary of Labor, William Usery, Jr., citing the precedent of *Maryland v. Wirtz*, but noted it was "troubled" by the argument that the amendments intruded upon essential functions of state and local government. It left it to the Supreme Court to decide if it should "draw back from the far-reaching implications" of the *Wirtz* precedent.

In his opinion for the Court, Justice Rehnquist quickly pointed out that Congress's commerce power is plenary with regard to private activity, citing Chief Justice John Marshall in *Gibbons v. Ogden*,[7] and that its power extends to activity even purely intrastate in character where the activity effects commerce among the states. He then sought to distinguish the argument being made by the appellants in this instance, recognizing that they were not challenging the commerce authority of Congress. "Their contention, on the contrary, is that when Congress seeks to regulate directly the activities of States as public employers, it transgresses an affirmative limitation on the exercise of its power akin to other commerce power affirmative limitations contained in the Constitution." The commerce power might be limited, he said, when it ran up against, say the "right to trial by jury contained in the Sixth Amendment," or "the Due Process Clause of the Fifth Amendment."[8]

Two themes emerge, then, early in the majority opinion: Congress's commerce power is plenary over private activity, but states are not private employers, they are different; and there are limits to Congress's commerce power contained in the Constitution. And the constitutional provision that might limit the commerce power vis-à-vis the states? Consider the Tenth Amendment. "This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or regulate commerce," wrote the majority.[9] Turning to precedent established only the previous year in *Fry v. United States*,[10] Justice Rehnquist found that "the Court recognized that an express declaration of this limitation is found in the Tenth Amendment."

> "The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."[11]

Justice Rehnquist then built an argument, rooted in the text of the Constitution and Supreme Court precedent, "recognizing the essential role of the States in our federal system of government."

> Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union . . . But in many articles of the Constitution the necessary existence of the States, and within their proper spheres, the independent authority of the States, is distinctly recognized.[12]

It did not matter, according to Rehnquist, that, as Usery argued, the Court had upheld earlier sweeping exercises of Congress's authority that have curtailed the sovereignty of the states.

> It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States. We have repeatedly recognized that there are attributes attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.

Pointing to a case from 1911, he found as examples of essential state powers the ability to decide the location of the state capitol and to determine how to appropriate public funds. And for Justice Rehnquist and the majority, "[o]ne undoubted attribute of state sovereignty" was the state's power to decide how much it would pay its employees and the hours they would work. The Court built on this point by citing the alleged costs and administrative burdens the FLSA amendments would impose upon the states and their potential to disrupt the delivery of services upon which citizens relied. Indeed, through its actions, Congress "may substantially restructure traditional ways in which the local governments have arranged their affairs."[13]

Summarizing, Justice Rehnquist asserted that the action taken by Congress "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions" and was therefore beyond the authority granted to Congress by the Commerce Clause. He then sought to clarify the majority's position with regard to two earlier precedents. While the Court was indeed overturning *Maryland v. Wirtz*, an earlier opinion on the application of FLSA to certain state employers, it was not overturning *Fry v. United States*,

A former welder and labor activist, W. J. Usery (pictured) was President Ford's Secretary of Labor in 1976.

which upheld the application of the Economic Stabilization Act to states because it was temporary in nature and "'an emergency measure to counter severe inflation that threatened the national economy.'"[14]

In summary, at least for the majority of the Court, states mattered. And Congress's authority to regulate the affairs of states acting in their sovereign capacity, even through the exercise of otherwise plenary Commerce Clause powers, was limited by the constitutional principle of federalism as embodied in the Tenth Amendment to the Constitution.

Justice Blackmun's concurring opinion, a mere paragraph in length, is important for two reasons: He admitted that he was "not untroubled by certain possible implications of the Court's opinion"; and he saw the Court embracing a "balancing approach" that would look at each set of issues regarding national versus state power with that sense of "balance" in mind.[15] In just a few years, Justice Blackmun would write the Court's opinion in the case that overturned *National League of Cities*, citing the inadequacies of the "balancing" approach, evidently having seen his troubles with this case come home to roost.

But before we consider how *National League of Cities* was overturned, let us turn to Justice Brennan's dissent. He did not mince words: "My Brethren thus have today manufactured an abstraction without substance, founded neither in the words of the Constitution nor on precedent." For Justice Brennan, the issue was really quite simple. Just as the majority did, he immediately cited Chief Justice Marshall in *Gibbons v. Ogden*. But he then moved immediately to the case I love to taunt my students with, *Wickard v. Filburn*, reaffirming not only the plenary power of Congress's commerce authority but also the principle "'that effective restraints on . . . exercise [of the commerce power] must proceed from political rather than from judicial processes.'" For Justice Brennan, his Brethren were engaged in nothing more than judicial activism, and citing "our decisions over the last century and a half," he asserted that "there is no restraint based on state sovereignty requiring or permitting judicial enforcement anywhere expressed in the Constitution."[16]

As for any reliance upon the Tenth Amendment, Justice Brennan would have none of it. Citing *United States v. Darby* (1941) he quoted:

> "From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end."

The majority's understanding of the Tenth Amendment "must astound scholars of the Constitution," according to Brennan.[17]

Indeed, Brennan found a hole in the state-sovereignty logic embraced by the majority. The sovereign immunity cited by the majority relied upon established precedent regarding the federal government's power to lay taxes,

not on Congress's commerce power. Recognizing that "'the implied immunity of each of the dual sovereignties of our constitutional system from taxation by the other'" had been "'recognized since Marshall's day,'" Brennan found firm precedent distinguishing the power to tax from the commerce power in regard to issues relating to sovereign immunity.[18] "'Hence we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. *But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.*'"[19]

Writing for the minority, Justice Brennan found old evils lurking beneath the surface of Justice Rehnquist's opinion for the majority. It was, he wrote, "a transparent cover for invalidating a congressional judgment with which they disagree." More importantly, to Brennan's mind, the majority's analysis harkened back to a line of cases that helped to provoke the Constitutional Crisis of the 1930s and President Franklin D. Roosevelt's ill-fated Court-packing plan. "It may have been the eventual abandonment of that overly restrictive construction of the commerce power that spelled defeat for the Court-packing plan and preserved the integrity of this institution."[20]

But Justice Brennan offered his strongest rebuttal to the majority for what he saw as a "startling restructuring of our federal system, and the role they create therein for the federal judiciary." He proceeded to outline his view of what federalism meant and how it was to operate under the Constitution. Justice Brennan and the minority argued that the interests of the states are woven into the national political process by the Constitution. Federalism, then, is the working out of that process. Finding that "the political branches of our Government are structured to protect the interests of the States, as well as the Nation as a whole," he went on to assert that "*[d]ecisions upon the extent of federal intervention under the Commerce Clause into the affairs of the States are in that sense decisions of the States themselves.*"[21] He argued that indeed, given the fact that our national political system is dominated by "representatives of the people elected from the States, ... it is highly unlikely that those representatives will ever be motivated to disregard totally the concerns of the States."[22] As evidence of this, he pointed out that the perceived cost impact upon the states of the 1974 amendments to FLSA paled in comparison to the amount of revenue the states received from the federal government. For Justice Brennan, this was the bottom line regarding the fabric of federalism under the Constitution. "*Given this demonstrated ability to obtain funds from the Federal Government for needed state services, there is little doubt that the States' influence in the political process is adequate to safeguard their sovereignty.*" Chastising his Brethren, Justice Brennan lamented the "conceptually unworkable essential-function test" and the "*catastrophic judicial body blow at Congress' power under the Commerce Clause*" inflicted by the majority.[23]

Stepping back for a moment, let us consider where things stood when the Court handed down *National League of Cities.* It was an important decision for several reasons. It asserted that there were indeed limits to Congress's Commerce Clause authority, not altogether without precedent, but it also asserted that one of those limits was state sovereignty. It argued that the Tenth Amendment, rarely the subject of much judicial scrutiny, was a statement attesting to the importance of state sovereignty. In limiting Congress's commerce authority, the Court said the obvious: It is one thing to regulate the activities of private employers engaged in commerce, and it is quite something else to limit the decisions and actions of sovereign states and their political subdivisions. And so the Court stepped in to defend, in its mind, federalism and the states against an ever-encroaching national legislature.

The minority seemed outraged, as did many in the press and the professoriate. Only Congress could determine the reach of its Commerce Clause authority. If Congress wanted to regulate the states in the manner outlined here, so be it. After all, the states had had a hand in writing the FSLA amendments, since Congress is composed of representatives elected by the people in the states. Who are we, the judiciary, to impose our notions of what constitutes state sovereignty and the appropriate exercise of the commerce power upon Congress and the Constitution?

These are the two schools of thought that, in my mind, are embraced in this case. But stepping back even further, when the Court said years ago, in so many words in a long line of cases, that commerce is anything Congress says it is—it really doesn't matter whether it is "among the several States" or completely within a state, whether the activity being regulated is actually commerce or any of a number of activities that might be considered to have an effect upon commerce—and when it said that Congress can regulate commerce in any way it chooses, then it, for good or for ill, put in place those conditions that encourage what James Madison observed in **The Federalist #48**: "The legislature ... extending the sphere of its activity, and drawing all power into its imperious vortex."[24] When Madison wrote this, he was commenting on the state legislatures, which, at the time, were indeed wrecking havoc. But his observation, he wrote elsewhere in those essays, extends to the very nature of the legislative function generally. In **The Federalist #51**, an essay devoted to the concept of separation of powers, he made this clear, and he pointed out the role states must have in keeping the national government—and its legislature—in place. "In republican government, the legislative authority necessarily predominates," observed Madison.[25] The remedy for this: a bicameral Congress and an energetic executive with competent powers. But also essential were states able to challenge the inevitable encroachments of the national legislature: "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each is subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time each will be controlled by itself." For Madison, at least in the **Federalist**s, state sovereignty was a part of separation of powers, and federalism was supposed to help keep the national government in its place.

Now the issue becomes, what brand of federalism? The one outlined in the majority opinion in *National League of Cities*, or in the minority opinion in that case, which emerged as the majority opinion in *Garcia*? *Garcia* was decided in 1985 by an again very divided Court. That Court overturned *National League of Cities*, with Justice Blackmun writing for the majority, having grown weary, it seemed, of the struggle to achieve the sort of "balance" regarding commerce between congressional and state power that he had sought to achieve and frustrated with the attempt to determine some rules regarding just what it was that constitutes "essential governmental functions." The two cases are mirror opposites. In the years between the two cases, Justice Potter Stewart, who had joined the majority in *National League of Cities*, was replaced by Justice Sandra Day O'Connor, who joined the minority in *Garcia*.

The facts in the case are straightforward. In 1979, the Wage and Hour Division of the Department of Labor issued an opinion that the San Antonio Metropolitan Transit Authority (SAMTA) was not immune from the minimum-wage and overtime requirements of FLSA under *National League of Cities*, arguing that SAMTA was not a traditional governmental function.

The Court had struggled for years to determine the prerequisites for state sovereign immunity under *National League of Cities*. In *Hodel v. Virginia Surface Mining and*

In *National League of Cities v. Usery*, the Court held that if Congress applied the FLSA to state and local government employees "in areas of traditional governmental functions," it would violate the Tenth Amendment. Pictured is the state house in South Dakota.

Reclamation Association, it came up with a four-part test: The issue must regulate "States as States"; the issue must address matters that are indisputably attributes of state sovereignty; state compliance must directly impair the states' ability to structure the operations of traditional governmental functions; and, the nature of the relation of state and federal interests must not be such that the nature of the federal interest justifies state submission.[26]

Garcia focused on the "traditional governmental functions" test. But the majority, finding it difficult—if not impossible—to identify some organizing principle with which to determine just what constitutes a "traditional governmental function," threw the concept out as unworkable and overturned *National League of Cities*. For the majority, the idea of deciding just what it is that constitutes the contours of state sovereignty by referring to "traditional governmental functions" was not unlike its challenge years earlier regarding pornography: "someone knows it when they see it, but they can't describe it." More importantly, Blackmun argued, any rule that looks to a "traditional" or "integral" or "necessary" function of government "invariably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."

> Any such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles.[27]

The majority then went on to embrace an understanding of federalism and the Tenth Amendment that had been put forth by Justice Brennan writing for the minority in *National League of Cities*. The principal means "chosen by the Framers to ensure the role of the States in the federal system lies in the

structure of the Federal Government itself." Finding that the Constitution was created, in large part, to protect the states from overreaching by Congress, Justice Blackmun created a sort of "cost/benefit" calculus for determining the contours of contemporary federalism. Finding that "federal grants now account for about one-fifth of state and local government expenditures," he asserted that "the structural protections of the Constitution insulate the States from federally imposed burdens."

> The political process ensures that laws that unduly burden the States will not be promulgated. In the factual setting of these cases the internal safeguards of the political process have performed as intended.

For Justice Blackmun and the majority, then, "in *National League of Cities* the Court tried to repair what did not need repair."[28]

Justice Powell, chafing at the majority's own contributions to inconsistency by overturning multiple precedents established since *National League of Cities*, warned that the real danger with the majority's opinion was "what the Court has done to the Constitution itself."

> Despite some genuflecting in the Court's opinion to the concept of federalism, today's decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause.

Then, pouncing on the majority's apparent concern with judicial intervention in the name of protecting the states as states, Justice Powell let fly.

> I note that it does not seem to have occurred to the Court that *it*—an unelected majority of five Justices—today rejects almost 200 years of the understanding of the constitutional status of federalism. In doing so, there is only a single passing reference to the Tenth Amendment. Nor is so much as a dictum of any court cited in support of the view that the role of the States in the federal system may depend upon the grace of elected officials, rather than on the Constitution as interpreted by this Court.

In the minority's view, "[t]he States' role in our system of government is a matter of constitutional law, not of legislative grace." And, even "[m]ore troubling . . . is the result of [the Court's] holding, *i.e.*, that federal political officials . . . are the sole judges of the limits of their own power."[29]

Justice Powell also rejected attempts to define federalism in terms of dollars and cents going to the states or political squabbles over policy choices. For him, the issue was far more fundamental, reaching to the "balance of power between the states and the federal government, a balance designed to protect our fundamental liberties." Closing, he wrote:

> The Court's action reflects a serious misunderstanding, if not an outright rejection, of the history of our country and the intention of the Framers of the Constitution. . . . Although the Court's opinion purports to recognize that the States retain some sovereign power, it does not identify even a single aspect of state authority that would remain when the Commerce Clause is invoked to justify federal regulation.[30]

So here we have it. Within a mere nine years, one understanding of the Commerce Clause and federalism and state sovereignty and the Tenth Amendment was displaced by another. What are we to make of this? And what might the future hold? It seems to me that the same questions I have posed to my students over the years—the questions I raised earlier this evening—might provide some help.

When the Court was asked the question years ago—what is commerce among the several states?—it first said one thing and then, over time, and not necessarily with great consistency, said other things. Gradually, however, it has said that interstate commerce is

whatever Congress says it is and wherever Congress says it is and is engaged in by whomever Congress says. This is surely at odds with the words as they appear in the Constitution. Not anything, not everything is interstate commerce. But it also might be argued that, in the modern world, it is hard to come up with examples of activities, public and private, that do not touch upon some aspect of interstate commerce. I did buy my plants at a nursery, which purchased them from a greenhouse in another state. This helps to explain, even if not in a completely satisfying way, how the words "commerce among the several states" has come to have such an expansive meaning.

But what about Congress's apparently almost unbridled authority under those words? Well, it comes with the changing territory. The Constitution makes it clear that Congress has authority over interstate commerce. When interstate commerce becomes as broadly defined as it has become, then Congress's power becomes broadly defined as well. What once was limited by the language of the document is now almost unlimited and therefore indeed empowering.

And what about the other part of the "balance" so sought by Justice Blackmun: federalism, the Tenth Amendment, state sovereignty? Here the question I asked my students seems relevant as well. Why states? When the Constitution was written, federalism and the interests of the states as states were, indeed, woven throughout. The Senate, as Madison observed in **The Federalist**, was designed to reflect the sovereignty residing within the states and to protect that sovereignty. The electoral college, the confirmation process and ratification process within the Senate, the process of amending the Constitution, and the Tenth Amendment: All of these as originally incorporated into the Constitution reflect a concern with the "balance" Blackmun sought and Madison heralded in **Federalist #51**: A compound republic in which governments check one another and are checked from within as well.[31]

At the time the Constitution was written, there was a universal recognition of the sovereignty of the states—perhaps begrudgingly among some in attendance in Philadelphia—and an acknowledgement that state sovereignty mattered. There was great debate over how to fashion a national government that could exercise competent powers while at the same time not destroying the sovereignty of the states. This was the issue that consumed most of the deliberations in the summer of 1787. There were many compromises in this effort. One was to delegate to the Congress the authority to "regulate commerce among the several States." Again, carefully chosen words. Commerce among states is, by definition, beyond the sovereignty of any single state.

With the changes to the Constitution brought about during the Progressive Era—the Sixteenth Amendment establishing the national income tax and the Seventeenth Amendment establishing the direct popular election of individuals to the Senate and ending the selection of Senators by state legislatures—both of which were products of a growing democratic sentiment among the people, the constitutional ground began to shift. Now there is no difference between the dynamic driving representation and deliberation in the House and in the Senate. Both are accountable to the people directly, though surely under different terms of service and modes of operation. The Senate, originally conceived as an institution to represent the interests of the states as states, now represents the people in a Senator's state and over time, the people of the nation. With this, along with the great revenue-raising advantage the national government possesses with an income tax, the very idea of the independent identity and authority and sovereignty of the states gradually comes into question.

These important changes in the Constitution, coupled with the Court's changing understanding of what commerce among the states means—an understanding driven by a perceived need to keep the Constitution relevant to the changing times and to meet national economic challenges—have altered, perhaps forever, what federalism and the authority of

the states might mean under our Constitution. In other words, what was once assumed—state sovereignty—has gradually been reduced to a difficult ongoing policy and political debate over what the national government can force upon states and whether or not the states possess any independent authority to counter such actions.

Any attempt to counter national action with an argument based on state sovereignty requires asking the question: "What is it that constitutes state sovereignty?" Hence, the "essential governmental functions" argument that comes with *National League of Cities* and is disposed of with *Garcia*. The "essential governmental function" test was the Court's way of trying to give meaning to a concept that was, once upon a time, taken for granted as a political principle: state sovereignty and federalism.

State sovereignty is difficult to define in terms of some specific authority or power to counter the enumerated powers of Congress, particularly as those powers have evolved over time. Add to this the way states have been willing to submit to national regulation in exchange for increased revenues, in part due to the advantage the national government has in raising those revenues, and suddenly my students seem pretty prescient. When I ask them "Why states?" they cite the need for subunits of government to administer public policy and affairs. And, with *Garcia*, they seem dead on.

In *National League of Cities*, the Court sought to revive, through judicial interpretation, an idea of federalism and state sovereignty and limited, enumerated national powers very much in harmony with the Constitution of 1787. But that Constitution no longer exists, and the world in which contemporary constitutional interpretation takes place is vastly different from that of 1787. One doesn't speak of state sovereignty or limited enumerated powers very much anymore, sadly.

Whether this will continue to be the case, given the ephemeral nature of constitutional interpretation, is for the future to decide. Recent years have witnessed some rumblings that suggest this debate is not yet over. We shall see.

But as for me, I know I am not engaged in interstate commerce when I grow and eat my salad. And I know where I live and why.

ENDNOTES

[1]317 U.S. 111 (1942).
[2]426 U.S. 833 (1976).
[3]392 U.S. 183 (1968).
[4]469 U.S. 528 (1985).
[5]321 U.S. 100, 115 (1941).
[6]29 U.S.C. 203(s)(5) (1970 ed.) (emphasis added).
[7]9 Wheat. 1 (1824).
[8]*National League of Cities v. Usery*, 426 U.S. 833, 841 (1976).
[9]*National League of Cities*, 426 U.S. at 842.
[10]421 U.S. 542 (1975).
[11]*National League of Cities*, 426 U.S. at 842–43 (quoting *Fry*, 421 U.S. at 547 n.7).
[12]*National League of Cities*, 426 U.S. at 844 (quoting *Lane County v. Oregon*, 7 Wall. 71, 76 (1869)).
[13]*National League of Cities*, 426 U.S. at 845, 849.
[14]*National League of Cities*, 426 U.S. at 852–53 (quoting *Fry*, 421 U.S. at 548).
[15]*National League of Cities*, 426 U.S. at 856 (Blackmun, J., concurring).
[16]*National League of Cities*, 426 U.S. at 860, 876, 858 (Brennan, J., dissenting) (quoting *Wickard v. Filburn*, 317 U.S. 111, 120 (1942)).
[17]*National League of Cities*, 426 U.S. at 862–63 (Brennan, J., dissenting) (quoting *U.S. v. Darby*, 312 U.S. 100, 124 (1941)).
[18]*National League of Cities*, 426 U.S. at 864 (Brennan, J., dissenting) (quoting *New York v. U.S.*, 326 U.S. 572, 587 (1946) (Stone, C.J., concurring)).
[19]*National League of Cities*, 426 U.S. at 866 (Brennan, J., dissenting) (quoting *U.S. v. California*, 297 U.S. 175, 185 (1936) (emphasis added)).
[20]*National League of Cities*, 426 U.S. at 867–68 (Brennan, J., dissenting).
[21]*National League of Cities*, 426 U.S. at 875–76 (Brennan, J., dissenting) (emphasis added).
[22]*National League of Cities*, 426 U.S. at 877 (Brennan, J., dissenting).
[23]*National League of Cities*, 426 U.S. at 878, 880 (Brennan, J., dissenting) (emphasis added).
[24]*The Federalist* at 333 (Jacob E. Cooke, ed., 1961).
[25]*Federalist* at 351.
[26]452 U.S. 264, 287–88 (1981).
[27]*Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547 (1985).
[28]*Garcia*, 469 U.S. at 550, 552–53, 555–57.
[29]*Garcia*, 469 U.S. at 560–61, 567 (Powell, J., dissenting).
[30]*Garcia*, 469 U.S. at 577, 579 (Powell, J., dissenting).
[31]*Federalist* at 351.

The Judicial Bookshelf

D. GRIER STEPHENSON, JR.

A well-established fact of American government is the unpredictability of vacancies on the U.S. Supreme Court. Representatives and Senators face voters every two and six years, respectively. A President serves for four years and may be reelected only once. Justices, however, do not sit for fixed terms and in effect enjoy life tenure. After his inauguration as the forty-third president in January 2001, George W. Bush had no opportunity to make a High Court appointment until he was well into his second term when, on July 1, 2005, Justice Sandra Day O'Connor announced her intention to leave the Bench.[1] By contrast, the forty-fourth President encountered his first High Court vacancy much sooner, and in his first term, as Justice David Hackett Souter notified the Obama White House on May 1, 2009, of his intention to retire from "regular active service as a Justice" when the Court recessed for the summer.[2]

Souter had been named to the Court in 1990 by President George H. W. Bush to fill the vacancy created by the retirement of Justice William J. Brennan, Jr. Indeed, the nomination was announced barely seventy-two hours after news of Brennan's departure became public and a mere three months after Souter's appointment to the First Circuit Court of Appeals, where he had been confirmed unanimously by the Senate. The first Justice to be named from New Hampshire since Levi Woodbury in 1845 and the first bachelor since Frank Murphy in 1940, Souter was a close friend and political protégé of New Hampshire Senator Warren Rudman and had been state attorney general and a trial judge before Governor John Sununu (later President George H. W. Bush's Chief of Staff) placed him on the state supreme court in 1983.

The selection of Souter seemed dictated by several factors. First, the Senate's rejection of President Ronald Reagan's nomination of Judge Robert Bork to the Court in 1987 to fill the seat vacated by the retirement of Justice Lewis F. Powell, Jr., was still a fresh and, for most Republicans, a painful memory. The Bork episode had been true political trauma as well as drama. While hardly the first contentious judicial nomination, it became one of the most tumultuous. Hearings by the Senate Judiciary spanned a record-setting[3] twelve days, and Bork testified and was questioned on five of those days. The printed transcript of the hearings and related documents consumed five

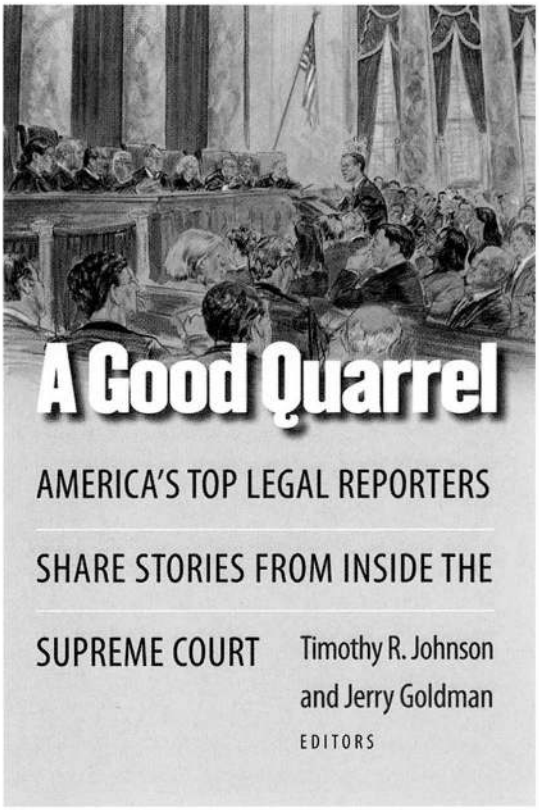
volumes, which in turn fill 8.5 linear inches of shelf space.[4] For very different reasons, therefore, President Bush's advisers and many Senators wanted assurance that any nominee to succeed Justice Brennan pass the "not Bork" test. Judge Bork's lengthy "paper trail" of articles had provided ammunition for, and had helped to energize, his opponents. Now prudence seemed to dictate selection of someone who had spoken and written less, someone whose public life had been decidedly low-profile. Second, Bush faced a Senate firmly in Democratic hands. Third, the President's previously high public approval ratings had fallen precipitously, and with them his congressional influence. In short, the President was in no position to force a controversial nominee on the Senate. In contrast to Bork's résumé, Souter's yielded few clues to his thinking on the most politically divisive federal constitutional issues. For Alabama's Senator Howell Heflin, he was "the stealth candidate." On national television, Justice Thurgood Marshall harrumphed, "Never heard of him."[5] The contrast with what had abundantly been known about Bork was stunning—deliberately so, in the opinion of suspicious senators. Many forgot that Brennan himself had seemed rather obscure upon his appointment by President Dwight Eisenhower in 1956. Brennan, after all, had had but four years of experience on the New Jersey supreme court.

Bush disavowed the use of "any litmus test" on abortion or on any other specific matter. Was Bush heeding Abraham Lincoln's advice? Presented with the opportunity to name Roger Taney's successor as Chief Justice in 1864, Lincoln advised, "We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it. Therefore, we must take a man whose opinions are known."[6]

Democrats on the Senate Judiciary Committee unabashedly asked the questions President Bush presumably had not, making it apparent that abortion was the ever-present issue at the hearings. In particular, Senator Edward M. Kennedy, who had so successfully helped to define Judge Bork in a way that ultimately was fatal to his nomination,[7] attempted the same approach with this nominee and proved to be "Souter's most skeptical interrogator."[8] Referring to Souter's record as New Hampshire's attorney general, Kennedy claimed that no other public employee had been "so hostile to civil rights."[9] While Souter spoke to some issues, he remained silent on the abortion right even as he demonstrated empathy for women facing an unwanted pregnancy. According to his biographer, during a morning break in the proceedings, Souter and a friend retreated to the nearby office of Republican Alan Simpson, Wyoming's folksy junior senator, who was also a member of the Judiciary Committee. A boyhood fan of Saturday matinee westerns, Simpson compared Souter's encounter with Kennedy to movie hero Roy Rogers' final gun fights with the outlaws. "It always ended up," said Simpson, "with the bad guy biting the dust. And some old codger would say, 'You don't mess with Roy Rogers.' Judge, that's what I thought when you finished with Ted Kennedy: You don't mess with old Roy."[10] Souter demonstrated Granite State tenacity in skillfully deflecting cross-examinations conducted by other Democrats as well. Overall, his adroitness and reticence made it difficult for opponents to villainize him and so to mobilize the kind of interest-group and broad public opposition that had worked so effectively in scuttling Bork's nomination. On October 2, the Senate voted overwhelmingly (90–9) to confirm Souter as the 105th Justice, barely two weeks after his 51st birthday.

Intensive interest in President Barack Obama's choice of a successor[11] to Justice Souter is a reminder of the widespread awareness of the central role that the Supreme Court continues to play in the life of the Republic, an interest keenly mirrored in several recent publications.

That much seems clear from even a cursory look at **A Good Quarrel.**[12] Edited by political scientists Timothy R. Johnson and



To further illuminate the eleven oral arguments presented in *A Good Quarrel*, the editors have embedded interactive links within each essay that cleverly and imaginatively connect each author's analysis to the oral arguments themselves.

Jerry Goldman of the University of Minnesota and Northwestern University, respectively, their book provides a creative and imaginative window into oral argument, a key step in the Court's decisionmaking procedures.

As succinct as it is uncommonly descriptive, the title conveniently reflects a double reality about the judicial process that unfolds each Term at the Supreme Court. First, cases are indeed *quarrels*. "[L]ife is self assertion," Judge Learned Hand once counseled. "Conflict is normal; we reach accommodations as wisdom may teach us that it does not pay to fight."[13] Cases are thus the raw material of the judicial process—the controversies with which judges deal and from which they weave the tapestry of the law. Hence the self-imposed "case or controversy" requirement that interpretation of Article Three of the Constitution has allowed the federal courts since the founding years of the Republic to confine themselves to live disputes, thus usually steering clear of hypothetical or contrived litigation. Similarly, federal judges are barred in any official capacity from serving as advisers to legislators or executives and from issuing the advisory opinions that are allowed in some state courts.[14] Second, many "quarrels" that reach the Supreme Court are indeed *good* quarrels—not "good" in a normative or ethical sense, but "good" in the sense that a clash, because of what is at stake and/or because of the skill displayed by the participants, is engaging or interesting. In turn, a quarrel may attract our attention because examination of the dispute leads to greater understanding of both the issue and the process employed to resolve it.

What Johnson and Goldman have compiled is a collection of eleven accounts of arguments before the High Court. As Richard J. Lazarus, of the Georgetown University Law Center, writes in the Foreword, "An oral

argument before the Supreme Court may well be the most fascinating, almost mystical, aspect of our nation's lawmaking process. Private citizens cannot join the president and the cabinet in the White House when they debate urgent policy matters. Private citizens cannot appear in the well of Congress, admonishing lawmakers to pass needed legislation. But ironically, the most private of our three branches of government offers the public moments with private attorneys representing clients taking center stage."[15] Each of these eleven accounts is authored by a print or television/broadcast journalist who has built a national or regional reputation writing about the Supreme Court. Many of the names will be familiar to those who closely follow the Court's work through the news media: Fred Graham, formerly of the *New York Times* and CBS News and more recently of Court TV, Lyle Denniston, formerly of the *Baltimore Sun* and now a frequent contributor to scotusblog.com, Tim O'Brien of ABC News, and Nina Totenberg of National Public Radio, to name but four. The roster is a reminder of the critical role of the media in conveying the essence of the Court's decisions to ordinary citizens, a function highlighted in a recent issue of this journal.[16] Journalists are part of what the late Gabriel Almond long ago called "the communications elites,"[17] individuals who influence the thinking of various opinion leaders who in turn help to mold the thinking of the general public in a two-step flow. Cases spotlighted in **A Good Quarrel** include some of the most significant ones decided in recent years: *Time Inc. v. Hill*[18] on libel, *Randall v. Sorrell*[19] on campaign finance, *Grutter v. Bollinger*[20] on affirmative action, and *Bush v. Gore*[21] on the keys to the White House.

The volume is much more than a collection of articles about interesting cases as crafted by talented writers, however. What sets the book apart are the interactive links embedded within each essay that cleverly and imaginatively connect each author's analysis to the oral arguments themselves. As the Preface explains, the reader can listen to audio files in one of two ways. Preferably, it seems, one begins at the Web site established by the University of Michigan Press for the book, goodquarrel.com.[22] There, the cases featured in the book are listed, and, as explained below, the reader merely clicks on the appropriate one and listens through her or his computer. Alternatively, the mp3 audio files may be downloaded to a compatible player. However, if this method is chosen, there is some loss of flexibility or ease of use unless one wants to hear an argument in its entirety. Then, within each essay in the book, a speaker symbol appearing in boldface type is set off in the margin at various points. This symbol alerts the reader to listen to a clip from the audio file that illustrates a point that the author has made. These clips are plainly marked on the Web site and are listed for each case in the order that they appear in the essay. Moreover, each clip is referenced with a page number and a brief description. The result, at least when drawing directly from the Web site, is a nearly seamless integration of the audio playback into the printed word. At the Web site, the reader/user may also click on "Oral Argument." This step allows access to the entire argument of a case from start to finish. Finally, clicking on "Opinion and Opinion Announcement" allows one to read the Court's opinion in the particular case and to hear (when available) the announcement of that opinion in open court.

This design is illustrated by "The Rhetorical Battle over Roe" by Denniston, the chapter constructed around the oral argument on April 22, 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[23] With the decision coming down some two months later on June 29 (practically on the eve of the Democratic and Republican presidential nominating conventions), this case yielded arguably the most important abortion-rights decision of the past two decades and tested the courtroom skills of three seasoned advocates: Kathryn Kolbert, an attorney from the American Civil Liberties Union in Philadelphia; Pennsylvania's

Attorney General Ernest Preate, Jr.; and, representing the interest of the United States, Solicitor General Kenneth W. Starr.

Under review in *Casey* was a Pennsylvania law that imposed several conditions for obtaining an abortion, including informed consent, a twenty-four-hour waiting period, parental consent for minors (coupled with a judicial bypass), spousal notification, and record-keeping requirements for medical personnel. A panel of the United States Court of Appeals for the Third Circuit, which included future Supreme Court Justice Samuel A. Alito, Jr., had upheld the statute, save for the spousal-notification requirement.[24] Certainly bearing on the Supreme Court's decision in *Casey* was a ruling from 1989: *Webster v. Reproductive Health Services*.[25] In that dispute, a Missouri statute (1) declared in its preamble that life begins at conception, (2) prohibited abortions performed in public facilities or by public employees, (3) prohibited public funding of abortion counseling, and (4) required viability testing prior to an abortion in a pregnancy of twenty weeks or more. Recently appointed Justice Anthony Kennedy and four other Justices voted to uphold the act. Yet there were not five votes to overturn *Roe v. Wade*[26] outright. Writing separately, Justice Antonin Scalia would have made that move. Chief Justice William Rehnquist and Justice Byron White, both dissenters in *Roe*, might have been expected to agree. Justice O'Connor, however, was not prepared to go that far, preferring instead to accept the statute as not "impos[ing] an *undue burden* on a woman's abortion decision."[27]

Nonetheless, *Roe* did not survive unscathed. In addition to upholding a statute that as late as 1986[28] surely would have been struck down, the Court went out of its way to lay aside *Roe*'s trimester analysis, which had rested on a balancing of the woman's decision to abort, the state's interest in her health, and the state's interest in prenatal life. Thus, after *Webster*, limits on abortion would now probably be deemed constitutional so long as they were "reasonable" and not unduly burdensome. Little wonder, then, that the retirements of Justice William J. Brennan, Jr., in 1990 and Justice Thurgood Marshall in 1991 (because their departures reduced the number of *Roe's* stalwart defenders on the Bench to two) meant that the views of replacement Justices Souter and Clarence Thomas might well be decisive. Understandably, both pro-life and pro-choice camps alike awaited the outcome of the Pennsylvania case.

As Denniston explains, in the wake of *Webster*, opponents of the statute proposed only a single question for the High Court's consideration: "Has the Supreme Court overruled *Roe v. Wade* . . ., holding that a woman's right to choose abortion is a fundamental right protected by the United States Constitution?"[29] Denniston reports that the Court's order on January 21, 1992, granting certiorari sent a clear signal that the Justices were not prepared "to assist Kolbert in her sweeping legal/political challenge."[30] Rather, the order, which according to Denniston had actually been drafted by Justice Souter, with editing by Justice John Paul Stevens, expressly limited review to whether the Third Circuit had erred in upholding the constitutionality of most of the statute and in striking down the spousal-notification rule. "To lawyers appearing regularly before the Court, the phrase *limited to* was close to a firm mandate."[31] But because the Solicitor General's brief urged reversal of *Roe* (as the government had done on five other occasions within a decade), Kolbert's merits brief "devoted the first twenty-six pages of a forty-eight page argument section to the plea to reaffirm *Roe* and the right to choose as 'a fundamental right protected' by the Constitution."[32] In his analysis of the oral argument, Denniston designates (using the boldfaced speaker symbol) no fewer than fifteen exchanges between counsel and the Justices. Thus, by clicking on the corresponding links at the book's Web site, the reader/user can hear the argument come to life with respect to those designated points.

The decision surprised both sides in the abortion controversy. It was neither the complete victory pro-life groups had sought nor the broad defeat pro-choice forces had feared. While the majority upheld all elements of the statute except the spousal-notification provision, the fifth vote to overturn *Roe* again failed to materialize. Confessing "reservations" about the correctness of *Roe* as it was decided in 1973, Justices Souter, Kennedy, and O'Connor in a joint opinion nonetheless reaffirmed what they termed "the central holding"[33] of *Roe*, that abortion involved a constitutionally protected liberty that states were forbidden to burden unduly. Coupled with *Roe*'s avowed champions (Justices Harry Blackmun and Stevens), the alignment left *Roe*'s avowed adversaries (the Chief Justice and Justices White, Scalia, and Thomas) in the minority. As Denniston concludes his treatment of the case, "Only the justices themselves, especially the trio that controlled the outcome, could say whether Kolbert's argument had set the agenda for the Court's deliberation. A solid, controlled oral argument can do that, even if it is not what the Court expects or wants."[34]

Pennsylvania's abortion statute would certainly not have occasioned that particular "good quarrel" had the Supreme Court not, much earlier, expressly established a constitutional right to privacy. While that moment of creation in the context of reproductive freedom is usually ascribed to *Griswold v. Connecticut*,[35] intimations of a privacy right had been floating in the legal air for some time. Justice Louis D. Brandeis, who as a young Boston attorney had co-authored an article on privacy,[36] later as a Justice referred in a dissent to "the right to be let alone" as "the most comprehensive of rights and the right most valued by civilized men."[37] And it was Justice William O. Douglas, author of the Court's opinion in *Griswold*, who had declared in *Skinner v. Oklahoma*[38] that "the right to have offspring . . . touches a sensitive and important area of human rights[,]. . . a right which is basic to the perpetuation of the race."[39]

Thanks to the thorough scholarly labors of Victoria F. Nourse, who holds joint appointments at the law schools of the University of Wisconsin and Emory University, *Skinner* is now the subject of a captivating study in legal and cultural history: **In Reckless Hands**.[40] Indeed, the title Nourse chose draws from the Court's opinion in that case, which, in striking down Oklahoma's compulsory sterilization law, warned that "in evil or reckless hands" such power could "cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of

The state of Virginia's forced sterilization of Carrie Buck, a "feeble-minded" woman (pictured), is the background for Victoria F. Nourse's new book, *In Reckless Hands*.

a basic liberty."[41] Ironically, as those words were penned in 1942, Nazis in Germany were attempting to eradicate Jewish people on a theory of their natural inferiority. Equally ironic alongside that dreadful development was the fact that eugenics—the "science" of improving humanity by sterilizing persons with certain mental, physical, or moral defects supposed to be hereditary—had become well ingrained as public policy in many places in the United States.

The author's felt need to investigate the saga that becomes **In Reckless Hands** illustrates at least part of Felix Frankfurter's observation that Nourse uses as an epigraph: "Lawyers, with rare exceptions, have failed to lay bare that the law of the Supreme Court is enmeshed in the country's history; historians no less have seemed to miss the fact that the country's history is enmeshed in the law of the Supreme Court."[42] Nourse's efforts also validate the assessment of Attorney General George W. Wickersham more than a century ago: "In the largest proportion of causes submitted to its judgment, every decision becomes a page of history."[43]

In addition to coming down during the heyday of Nazism in much of Europe, *Skinner* lay at the convergence of two important constitutional developments in the United States. The first was the Constitutional Revolution of 1937, which followed President Franklin Roosevelt's audacious attempt to change the course of constitutional doctrine by appointing a sufficient number of administration-friendly Justices to the Supreme Court to sustain the President's legislative Depression-era agenda, much of which had foundered on the shoals of unconstitutionality. While Roosevelt's Court-packing plan was rebuffed by Congress, the famous "switch in time" by one or two Justices, combined with several propitiously timed retirements, signaled that an entirely new approach to constitutional adjudication would soon become the order of the day. In short, with respect to most social and economic legislation, judicial restraint supplanted judicial activism. At least for a while, respect for legislative choices became the new virtue. In a democracy, *appointed* judges were on sounder footing when they deferred to the *elected* representatives of the people. The second major constitutional development during this period was, in reality, an exception to the first. As articulated by Justice Harlan Stone in Footnote Four of *United States v. Carolene Products Co.*,[44] and as a possible solution to the countermajoritarian difficulty posed by judicial review, judges in certain circumstances would be justified in overriding legislative directives, as when a statute (1) violated an explicit provision of the Constitution, (2) undercut the democratic process itself, or (3) worked a hardship on groups who were unable to defend themselves in the rough and tumble of majoritarian politics. *Skinner* reached the Supreme Court after both trends were underway, yet the first pointed toward one kind of result in the case, and the second towards another.

The fact was that the ideas of eugenics had become very popular in America. Indeed, by 1928 some 375 colleges and universities in the country taught course in eugenics, with some 20,000 students enrolled. Seventy percent of biology textbooks written for high-school use endorsed eugenics. It "enjoyed a large and diverse following, from Junior Leagues and high school principals and the Kiwanis to prohibitionists and birth control advocates [such as Margaret Sanger] and anti-miscegenationists."[45] While most criminologists knew that crime itself could not be inherited, they "believed that habitual criminality reflected mental deficiencies which could be inherited."[46] Thus, by 1933 twenty-seven of the forty-eight states had sterilization laws of some kind, so that during the 1930s there were about 2,000 compulsory sterilizations in the nation annually.[47] An "idea of nature" was transformed "into an idea of political order."[48] The widespread practice of eugenics reflected not only its mainstream popularity but the fact that the Supreme Court, in an opinion by

Justice Oliver Wendell Holmes, Jr., had upheld, against a challenge on Fourteenth Amendment due-process grounds, a salpingectomy ordered by the Commonwealth of Virginia to be performed on Carrie Buck, "a feeble-minded white woman who was committed to the State Colony [for Epileptics and Feeble Minded].... She is the daughter of a feeble- minded mother in the same institution, and the mother of an illegitimate feeble-minded child.... Three generations of imbeciles are enough,"[49] wrote the legal luminary.

Oklahoma's third and last sterilization measure was signed into law in 1935. Billed largely as a step to combat crime—"A lot of criminals will be kept out, or run out of Oklahoma,"[50] announced an assistant to the state's attorney general—the Habitual Criminal Sterilization Act applied to a habitual criminal, defined as one who, having been convicted two or more times for crimes "amounting to felonies involving moral turpitude" either in an Oklahoma court or in a court of any other state, was again convicted of such a felony in Oklahoma and was sentenced to a penal institution within the state. The state attorney general would then institute proceedings against the qualifying individual, who would have a jury trial at which the discretion of the jury would be limited to finding that the defendant met the statutory definition of a "habitual criminal" and that sterilization could be performed without detriment to the person's general health. However, the legislature inserted one important additional qualification: "[O]ffenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses, shall not come or be considered within the terms of this Act."[51]

After the attorney general began the first proceedings in May 1936 under the new law against a five-time offender named Hubert Moore, chaos and a jail break (minus Moore) erupted at the state's McAlester Prison. "News of the escape, with all its alluring detail of bodies thrown out of windows, cowboy hostages, and baying bloodhounds, traveled the nation."[52] But when Moore himself, now fully incentivized, escaped in June, the attorney general selected a substitute named Jack Skinner. Skinner qualified because he had served eleven months in a reformatory for stealing chickens, another term for armed robbery,[53] and a third incarceration after he held up a gas station and took seventeen dollars.

Following Skinner's trial in October and the jury's verdict that he be sterilized, the government had a relatively easy argument to make when an appeal went to the Supreme Court of Oklahoma. "[A]ll the state ... needed to tell the court was to defer to the Oklahoma legislature."[54] And of course, there was *Buck v. Bell*, in which the U.S. Supreme Court had found a similar statute well within a state's police power. It was, therefore, not surprising that the state's high court ruled against Skinner. What was surprising was that the bench was split. A dissent joined by four justices took issue with the fairness of the proceedings but, without any citation, also asserted that the right to beget children was "one of the highest natural, inherent rights."[55]

Skinner was fortunate in that two talented Oklahoma attorneys, Guy Andrews and H.I. Ashton, entered his case at practically the last moment to guide an appeal to the U.S. Supreme Court. Andrews even had experience at the High Court, having been losing counsel in the *New State Ice* case[56] that today is remembered for Justice Brandeis' reference in dissent to the states as laboratories of public policy.[57] Andrews and Ashton based their argument on equal protection and due process, stressing the irrationalities of the law. The worst criminals, such as Al Capone and Giuseppe Zangara (who assassinated Chicago mayor Anton Cermak and attempted to assassinate President Franklin Roosevelt), would not be sterilized until they had been convicted three times. "Why did inheritance of criminal tendencies follow from three convictions but not two?" they asked.[58] Then there

was the law's exemption for certain kinds of white-collar offenses. Was the legislature attempting to establish an "aristocracy of crime, relieving favored [criminals] of the burdens borne by those less fortunate?" [59] As stressed in Conference by Justice Frankfurter, it was the equality argument that proved dispositive when the Justices considered Skinner's case. Initially, Chief Justice Stone, author of Footnote Four from the *Carolene Products* case but also a strong proponent of judicial restraint, was not inclined to depart from *Buck v. Bell*. As Nourse explains, "a narrow equality argument focused on the precise language of the statute might allow the Chief Justice to leave *Buck* alone but strike down Oklahoma's eugenic effort."[60] That was the rationale that William O. Douglas employed after Stone assigned the opinion to him.

Aside from a readable exploration of *Skinner* and its context, a major contribution of **In Reckless Hands** lies in shifting the way the decision is typically viewed from reproductive freedom to equal protection.[61] While Skinner would "forever [be] deprived of a basic liberty [,]" wrote Douglas, "[w]e mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that *strict scrutiny* of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws. The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.'"[62] Skinner's innovation, writes Nourse, "was not the invocation of right, but the idea that rights married to inequality could trigger 'strict scrutiny'—a term used for the first time in *Skinner* and one which would become central to the future of constitutional law."[63] One might add that *Skinner*'s injection of strict scrutiny also connects with the substantive equal protection that emerged in the late Warren Court in the context of cases such as *Shapiro v. Thompson*.[64]

The Stone Court only tangentially touched sexual intimacy in *Skinner*. The later Burger and Rehnquist Courts confronted it squarely, first in *Bowers v. Hardwick*[65] and then in *Lawrence v. Texas*.[66] This pair of decisions is the subject of **The Sodomy Cases**[67] by David A. J. Richards of the New York University School of Law.[68] His book is one of the latest volumes to appear in the Landmark Law Cases & American Society Series. Published by the University Press of Kansas under the general editorship of Peter Charles Hoffer and N.E.H. Hull, the series of case studies now claims several dozen titles, almost all of them treating decisions by the U.S. Supreme Court. Additional entries are presumably in preparation.[69]

In *Bowers*, reversing a decision of the Court of Appeals for the Eleventh Circuit, five Justices upheld the constitutionality of Georgia's sodomy statute, which made criminal certain combinations of private parts. The law applied to heterosexual as well as homosexual behavior, although Justice Byron White's opinion of the Court, perhaps deliberately, seemed to regard the law as if it made only the latter criminal. The divided Bench revealed that no consensus existed concerning what constitutionally protected privacy encompassed. Many observers were surprised that, in the wake of *Griswold* and the abortion cases, no majority existed for an extension in a situation involving consensual behavior between adults. The Court then revisited sexual intimacy in *Lawrence*, which not only invalidated a Texas statute that expressly criminalized only same-sex sodomy but straightforwardly overturned *Hardwick* and impugned the intellectual integrity of Justice White's opinion in that case.

Like Nourse's study of *Skinner*, Richards' book entails as much social history as legal development and analysis. Accordingly, near the outset, the author asks "how and why the Supreme Court inferred the constitutional right to privacy at all,"[70] as well as why the right was applied in some situations and not others. In addition, Richards wonders about

how and why certain normative ideas regarding gay rights developed and why "some of them are now acceptable as the bases of arguments about constitutional principle." So part of the author's investigation is "culturally developmental."[71] In places, it is didactically presented as well.

As some readers of this journal are aware, one of the more intriguing aspects of the *Hardwick* decision was Justice Powell's change of mind late in the decisionmaking process, converting what had been a 5–4 judgment for Michael Hardwick into a 5–4 victory for Georgia's attorney general, Michael Bowers. One important contribution of **The Sodomy Cases** is the detail Richards' examination presents about this noteworthy turn of events.

For astute observers and for Professor Laurence Tribe of the Harvard Law School—who, with Professor Kathleen Sullivan, then also at Harvard, coauthored the brief for Hardwick and spoke for him at oral argument—the "crucial swing justice on the Court was Justice Powell,"[72] and it was to him that Tribe largely directed what he had to say. The goal was to convince this supporter of *Roe v. Wade* that the extension of constitutionally protected privacy to gay/lesbian sex acts in the home could be both limited and principled while "not undermining the legitimacy of other criminal laws forbidding forms of consensual adult sex."[73] However, Richards explains that Tribe could not have known that shortly before argument, one of Powell's clerks submitted a twelve-page Bench memorandum to the Justice arguing strongly against that extension of the privacy principle because "no limiting principle comes to mind," and because it might open the way to unchecked sexual behavior.[74]

Powell then responded in a memorandum, probably written two days before oral argument, that indicated great discomfort with Tribe's position. "A problem would be to identify some limiting principle if we are inclined to agree with the court of appeals and Professor Tribe. A number of examples come to mind: would the term 'home' embrace a hotel room, a mobile trailer (yes, I think), a private room maybe available in a house of prostitution or even in a public bar, the 'sanctity' of a toilet in a public restroom? . . . And if sodomy is to be decriminalized on constitutional grounds, what about incest, bigamy and adultery?"[75] Between this exchange and the vote in conference, Richards reports, there were a number of memos back and forth, as Powell sought to find an acceptable way of invalidating Georgia's antisodomy law. Eventually, however, Powell abandoned the approach through privacy and settled on an Eighth Amendment basis, reflecting *Robinson v. California*,[76] that "if Hardwick was powerless to change his sexual orientation, it was wrong to punish him for acting on it."[77]

At the conference on April 2, 1986, "having found a way to avoid his worries about a 'limiting principle' for the right of constitutional privacy, Powell voted to affirm," as did four other Justices. The clerk who had sent the initial memorandum continued to argue for reversing. Then on the day after conference, "Chief Justice Burger personally delivered a letter urging Powell to provide the crucial fifth vote for reversal."[78] It was in that letter that the Chief Justice maintained that the case presented "for me the most far-reaching issue" of his thirty-year judicial career." Furthermore, absence of a limiting principle "would forbid states from adopting any sort of policy that would exclude homosexuals from the classrooms or state-sponsored boys' clubs. . . ."[79] According to Richards, Powell wrote "Incredible statement" next to the Chief Justice's assessment of the case, and across the top wrote "There is both sense and nonsense in this letter—mostly the latter."[80] But other notes showed that Powell was reconsidering his vote. Powell soon wrote the other Justices of his conclusion to switch sides. "I did not agree that there is a substantive due process right to engage in conduct that for centuries has been recognized as deviant, and not in the best interest of preserving humanity." Because the only question presented by the parties rested on due process, he acknowledged that "as

several of you noted at Conference—my Eighth Amendment view was not addressed by the court below or by the parties."[81]

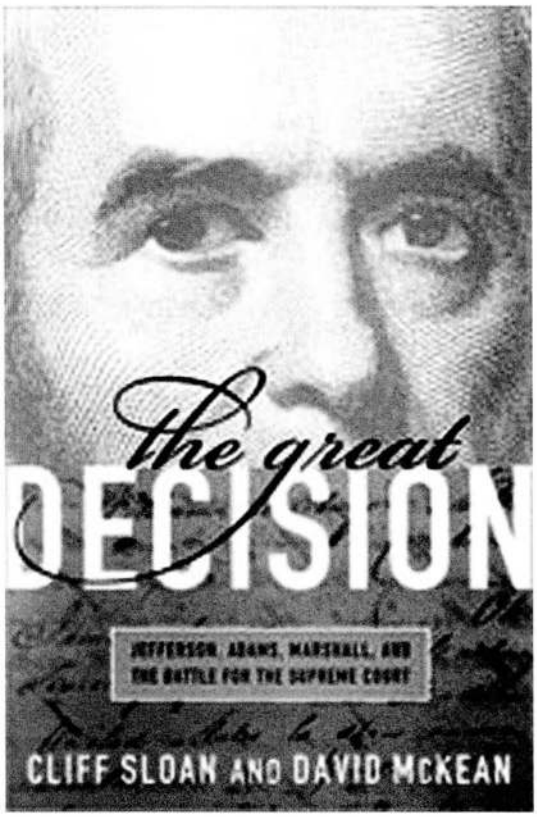
After his retirement, Powell admitted that his changed vote had been a mistake. "I do think it was inconsistent in a general way with *Roe*," he remarked to a reporter. "When I had the opportunity to reread the opinions a few months later, I thought that the dissent had the better of the arguments."[82] "There can be no more fundamental criticism of any justice," Richards adds, "and Powell came conscientiously to accept this criticism of himself." [83] As events progressed, it proved to be another clerk to Justice Powell (from the early 1980s) who would successfully argue *Lawrence v. Texas*,[84] which not only interred *Hardwick* but supported "how reasonable [*Roe*] remains for constitutional privacy as a free-standing constitutional right" in the context of extending it "to a traditionally despised minority."[85]

Roe and *Lawrence* are each an example of judicial review, the authority of a court to invalidate a legislative enactment that, in the judges' view, conflicts with the Constitution. With respect to acts of Congress, that power is nearly uniformly agreed to have originated with *Marbury v. Madison*,[86] decided by the Supreme Court over two centuries ago during what might be called the adolescence of America's history as a nation. That case is the focus of **The Great Decision** by Cliff Sloan and David McKean.[87] The first author is a partner at the law firm of Skadden, Arps, Slate, Meagher & Flom in Washington, D.C.; the co-author was chief of staff to United States Senator John Kerry and in 2009 became staff director to the Senate's Committee on Foreign Relations.

Any author contemplating work on *Marbury* faces both challenge and opportunity. There is probably no case decided by the Supreme Court that, in one way or another, has been the subject of more scholarly attention and commentary. Aside from dozens of articles, every biography of Chief Justice John Marshall, who spoke for the Court in *Marbury*, devotes considerable space to this decision, as does every study of the Marshall Court (1801–1835) and every study of American constitutional development. In addition, barely a decade ago, *Marbury* was highlighted in the comprehensive Landmark Law Cases & American Society Series that published Richards' book.[88] The truth is that, thanks to *Marbury*, to write about the Court—at least the court in the first third of the nineteenth century—necessitates examination of Marshall's contributions, beginning with this case. Thus, anyone finding yet another account of *Marbury* may reasonably ask what more can be said that is new. Therein lies the opportunity: to fashion a treatment of a familiar case so that it is serviceable to the judicially aware and the judicial novice alike.

If any account of Supreme Court history can be classified as suitable in length, style, and content for reading at poolside, surfside, or fireside, this is the book. Sloan and McKean succeed because their work avoids the strong "temptation" Charles Warren observed for legal writers "to project the present aspect of a case back to the date of its decision, and thus to obtain an erroneous view of its contemporary importance. A decision gathers accretions with the passage of time, and frequently that portion of the opinion which was of the greatest import at the time it was rendered becomes subordinate to other consideration. This is particularly true as to . . . *Marbury v. Madison*."[89]

With almost the excitement of a novel, the authors achieve a proper balance between *Marbury*'s lasting significance and the vivid detail of what they call "a rich, complex, sometimes surprising saga."[90] Highly appropriate for a book published barely four months after a presidential election, **The Great Decision** relates a series of events "arising in the midst of bitter enmity between a new president, Thomas Jefferson, and a new chief justice, Jefferson's cousin John Marshall; emerging from the cauldron of political warfare between the defeated Federalists and Jefferson's triumphant Republicans; culminating in a triple bank shot by



The Great Decision **traces the history of** ***Marbury v. Madison*** **with the excitement of a novel.**

Marshall that enhanced the Court's power and prestige, avoided a futile confrontation between a weak Court and a strong president, and blasted Jefferson for lawless action without giving him opportunity for defiance."[91] As the reader discovers, an unexpected bonus is the window the volume offers into living conditions, political life, and social relationships in the young nation's new capital city.

The plot began to unfold on February 27, 1801, when Congress, still in the hands of the Federalists, passed legislation authorizing justices of the peace for the capital. President John Adams appointed forty-two—including William Marbury—on March 2, and the Senate confirmed them on March 3, only a day before Jefferson took office. Marshall, also Secretary of State, noticed that a few commissions of office had not been delivered but "thought little of it."[92] Marbury and four others then filed suit asking the Supreme Court for a writ of mandamus to compel delivery by James Madison, the new Secretary of State. The premise of the writ Marbury requested was that the executive branch was answerable to the judicial process in the course of exercising ordinary presidential powers such as appointments. In this instance, that meant a Republican cabinet official answering to a Federalist Bench. By early 1803, when the case was argued, the atmosphere was such that Marshall and his colleagues must have concluded that Madison, with the President's blessing, would almost certainly ignore any writ they might issue. The administration, after all, had effectively boycotted the hearing in that, while counsel spoke for the would-be magistrates, none spoke for Madison. What would the Court do? As events transpired, the Justices' resolution of the case seemed almost inspired: a decision that avoided a confrontation with the executive branch, addressed the Court's

role, and handed Marbury nothing more than a moral victory.

The Court achieved the third objective by excoriating the Jefferson administration for not giving the commissions to the would-be federal magistrates. The Court achieved the first objective by concluding, however, that it was powerless to order delivery of the commissions because Section 13 of the Judiciary Act of 1789, which authorized the Court to issue writs of mandamus as part of its original jurisdiction, violated Article III of the Constitution. The reasoning was that, since Article III spelled out the Court's original jurisdiction, Congress could no more add to that jurisdiction than it could take it away. If there was no order for Madison to disregard, there could be no confrontation.

Marshall's opinion addressed the second objective in two ways. First, in support of the position that the statute conflicted with the Constitution and so left the Court without authority to grant relief, the Court for the first time articulated a defense of the doctrine of judicial review. That is, the Court explained why the judiciary could not apply a statute passed by Congress that, in the Justices' view, conflicted with the Constitution. In so doing, Marshall implicitly countered the competing theories, in the wake of the national debate over the Sedition Act of 1798, that state legislatures or Congress were the appropriate forum to judge the constitutionality of national policy. Second, Marshall's opinion explained why the executive must be answerable to the Court, although in doing so Marshall was careful to distinguish between discretionary (that is, "political") actions that were not judicially cognizable and nondiscretionary actions that were. "By the constitution of the United States," conceded Marshall, "the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and *is accountable only to his country in his political character and to his own conscience*."[93] But delivery of commissions fell into the other category. "The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority."[94]

The essence of Marshall's opinion was that the Court was an independent entity of government. Rather than sit as the agent of one political force against another, the Court was the agent of the Constitution. An independent judiciary, moreover, was not the same as an administration-friendly or a party-friendly judiciary. Individuals claiming violations of rights might pursue judicial remedies. In short, under Marshall's reading, the Constitution was a juridical document; as law, particularly as paramount law, it was amenable to interpretation and application by courts. Judicial review was also expedient. As Professor Corwin explained much later, it was "the substitute offered by political wisdom for the destructive right of revolution."[95] For years, Jefferson resented Marshall's opinion in *Marbury*, although not entirely because of the Chief Justice's assertion of judicial review. As Sloan and McKean make clear, far more objectionable to him was that Marshall had gone out of his way to speak to the merits of Marbury's suit and to assert that the province of the judiciary encompassed oversight of the legality of executive functions.[96]

Aside from Jefferson's complaints, Marshall's position has hardly been without its critics through the years. But as William W. Van Alstyne wrote in what may be one of the most perceptive articles on *Marbury*, "Each argument, and each textual fragment on which the argument rested, may not seem especially compelling by itself. However, perhaps the separate pieces support each other, the fragments draw together, and the 'whole' of Marshall's argument is much better than each part separately considered."[97]

At least since the decision in *Marbury*, if not earlier,[98] the business of the Supreme Court has had a constitutional dimension. This much is readily apparent from the two-volume work entitled **Encyclopedia of the United States Constitution**, compiled and edited by David Schultz of the Department

of Political Science at Hamline University.[99] The set will be a useful addition to any reference collection, particularly one accessible to general readers. With 645 entries written by some 285 contributors, it is also testimony to considerable coordination and effort on Schultz's part.

As Schultz explains, the **Encyclopedia** "seeks to explain some of the major clauses, amendments, court decisions, personalities, issues, and challenges that have affected the Constitution over its history."[100] The goal derives from Justice Thurgood Marshall's observation in 1987, during national bicentennial celebrations of the Constitution, that "[w]hen contemporary Americans cite 'the Constitution,' they invoke a concept that is vastly different from what the Framers barely began to construct two centuries ago." Rather, Marshall continued, "the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for individual freedoms and human rights, which we hold as fundamental today."[101]

Understandably, therefore, Schultz places the focus throughout strongly on both American constitutional development and the Supreme Court. Accordingly, literally dozens of Supreme Court decisions are explored within individual entries, as are major statutes, terms, and concepts. The cases include not only those usually awarded "landmark" status (such as *Marbury v. Madison* and *Cooley v. Board of Wardens*[102]) but some very recent holdings too (such as *District of Columbia v. Heller*[103]). Happily there is the unexpected find as well, such as *Corfield v. Coryell*[104] from the Circuit Court level, although one wonders why *Butchers' Benevolent Association of New Orleans v. Crescent City Live-Stock Landing and Slaughter-House Co.*,[105] in which *Corfield* figures prominently, is not also at least cross-listed simply as "*Slaughterhouse Cases*." Someone interested in an entry on this case will not find it if the search is made by using only the familiar, but not the official, name of the case.

The objective and the breadth of the subject and the usual constraints imposed by publishers on length meant, of course, that the final selection of particular topics required the exercise of much discretion. As one would expect, there is an entry on each Justice currently serving on the Court, through the appointment of Justice Alito. Entries also highlight recent Justices such as Sandra Day O'Connor and William J. Brennan, Jr., but one finds none on either Byron White or Potter Stewart. As expected, Justices Hugo L. Black and William O. Douglas are included, but Felix Frankfurter and Robert H. Jackson are not. Among other individuals, Abraham Lincoln is included, but Andrew Jackson and the two Roosevelts who also served as President are not. Among entries on particular documents, one finds one on the Declaration of Independence but not one on the Articles of Confederation, although the Articles as a discrete document are reprinted in full in the Appendix. Especially useful is the nearly essay-length treatment afforded topics such as "American Indians and the Constitution" and "The *Federalist Papers*." Like the other books surveyed here, the **Encyclopedia** is a usable reminder of the broad and continuing role of the Supreme Court in the life of the American people.

THE BOOKS SURVEYED IN THIS ARTICLE ARE LISTED ALPHABETICALLY BY AUTHOR BELOW

JOHNSON, TIMOTHY R., AND JERRY GOLDMAN, EDS. **A Good Quarrel: America's Top Legal Reporters Share Stories from Inside the Supreme Court** (Ann Arbor: University of Michigan Press, 2009). Pp. xvi, 195. ISBN: 978-0-472-03326-3. Paper.

NOURSE, VICTORIA F. **In Reckless Hands: *Skinner v. Oklahoma* and the Near Triumph of American Eugenics** (New York:

W. W. Norton, 2008). Pp. 240. ISBN: 978-0-393-06529. Cloth.

RICHARDS, DAVID A. J. **The Sodomy Cases: *Bowers v. Hardwick* and *Lawrence v. Texas*** (Lawrence: University Press of Kansas, 2009). Pp. xiii, 265. ISBN: 978-0-7006-1636-7. Cloth.

SCHULTZ, DAVID, ED. **Encyclopedia of the United States Constitution**, 2 volumes (New York: Facts on File, 2009. Pp. xvii, 904. ISBN: 978-0-8160-6763-3. Cloth.

SLOAN, CLIFF, AND DAVID MCKEAN. **The Great Decision: Jefferson, Adams, Marshall, and the Battle for the Supreme Court** (New York: Public Affairs, 2009). Pp. xii, 258. ISBN: 978-0-472-10837-4. Cloth.

ENDNOTES

[1]For the O'Connor seat, President Bush nominated Judge John G. Roberts, Jr., on July 19, 2005. On September 3, however, shortly before hearings on the Roberts nomination were to begin in the Senate Judiciary Committee, Chief Justice William H. Rehnquist lost his struggle with cancer. For the first time since 1971, a President would have two Supreme Court seats to fill. In a decision that surprised few, Bush then announced on September 5 that he would nominate Roberts for the Chief Justiceship. Senate confirmation and the swearing in followed on September 29. Attention then returned to a replacement for Justice O'Connor, with Bush announcing on October 3 that her seat should go to White House Counsel and Bush confidante Harriet Miers. When Miers' nomination was withdrawn on October 27, the President turned on October 31 to Judge Samuel A. Alito, Jr., who was confirmed and sworn on January 31, 2006. Until Chief Justice Rehnquist's death in 2005, the Bench had been remarkably stable for a number of years. Indeed, at no time since 1869, when Congress set the Court's roster at nine, had so many years passed without a vacancy. Moreover, excepting only the period 1812–1823, the years between Justice Stephen G. Breyer's arrival in 1994 and the arrival of Chief Justice Roberts and Justice Alito in 2005 and 2006 mark the longest stretch of stability in Court membership on record.

[2]Letter, Justice David H. Souter to President Barack Obama, *available at* http://www.supremecourtus.gov/publicinfo/press/DHSLetter.pdf (last visited on September 27, 2009).

[3]Even the maelstrom that followed the nomination of Judge Clarence Thomas in 1991 fell short of the Bork statistics. Senate hearings for Judge Thomas lasted for eleven days. In printed form, they consume four volumes and occupy five linear inches of shelf space.

[4]Alongside the hearings for both Bork and Thomas, those for Kennedy nominee Byron White in 1962 seem decidedly quaint. Public hearings by the Judiciary Committee for White lasted a scant one hour and thirty-five minutes and in printed form fill no more than a thin pamphlet.

[5]Alpheus Thomas Mason and Donald Grier Stephenson, Jr., **American Constitutional Law: Introductory Essays and Selected Cases** (15th ed., 2009), 13.

[6]Charles Warren, **The Supreme Court in United States History** (rev. ed., 1926), vol. 2, 401.

[7]*See generally* Ethan Bronner, **Battle for Justice: How the Bork Nomination Shook America** (1990). The Bronner book is the most balanced book-length account of the Bork confirmation fight.

[8]Tinsley E. Yarbrough, **David Hackett Souter: Traditional Republican on the Rehnquist Court** (2005), 132.

[9]*Id.*

[10]*Id.*, 134.

[11]In May 2009, President Obama announced that he would nominate Judge Sonia Sotomayor of the United States Court of Appeals for the Second Circuit. The Senate confirmed Judge Sotomayor's nomination in August 2009.

[12]Timothy R. Johnson and Jerry Goldman, **A Good Quarrel** (2009), hereafter cited as Johnson and Goldman.

[13]Quoted in Irving Dillard, **The Spirit of Liberty** (1960), 101.

[14]These important limitations date from two precedent-setting positions adopted by the Court in the 1790s. First, five Justices "sitting in various circuit courts, held that Congress could not constitutionally require them to pass on the validity of veterans' pension claims" partly because such matters were nonjudicial in nature. The Justices avoided a collision with Congress on the pension-claims matter by reading the statute as designating them to act as commissioners, not judges. The Justices then performed this duty voluntarily. Second, through correspondence from Chief Justice Jay, the Court declined to render an opinion, requested by President Washington by way of Secretary of State Thomas Jefferson, on presidential regulations implementing the Neutrality Proclamation of 1793. *See* William M. Wiecek, **Liberty Under Law: The Supreme Court in American Life** (1988), 24–25.

[15]Johnson and Goldman, viii.

[16]Specifically, see issue number 2 of volume 29 of *The Journal of Supreme Court History* (2004). The article by L. A. Powe, Jr., is in fact entitled "Writing the First Draft of History." It focuses on Anthony Lewis, who was the first newspaper reporter assigned to cover the Supreme Court full time.

[17]Gabriel A. Almond, **The American People and Foreign Policy** (1950), 140.

[18]385 U.S. 374 (1967).
[19]548 U.S. 230 (2006).
[20] 539 U.S. 306 (2003).
[21] 531 U.S. 98 (2000).
[22]http://www.press.umich.edu/webhome/goodquarrel/ (last visited September 25, 2009).
[23]505 U.S. 833 (1992).
[24]Judge Alito dissented from the Third Circuit's holding on this point.
[25]492 U.S. 490 (1989).
[26] 410 U.S. 113 (1973).
[27]492 U.S. at 530 (O'Connor, J., concurring) (emphasis added).
[28]*See Thornburgh v. American College of Obstetricians and Gynecologists*, 474 U.S. 809 (1986). In this case, the Court struck down another comprehensive abortion statute from Pennsylvania.
[29]Johnson and Goldman, 44.
[30]*Id.*, 47.
[31]*Id.* (emphasis in the original).
[32]*Id.*
[33]505 U.S. 833, 853.
[34]Johnson and Goldman, 60.
[35]381 U.S. 479 (1965). *See, e.g.*, Alfred H. Kelly, Winfred H. Harbison, and Herman Belz, **The American Constitution: Its Origins and Development** (1991), vol. 2, 739–40.
[36]Samuel Warren and Louis D. Brandeis, "The Right to Privacy," 4 *Harvard Law Review* 220 (1890). Warren and Brandeis' particular concern was newspaper prying into personal affairs.
[37]*Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).
[38] 316 U.S. 535 (1942).
[39]*Id.*, 536.
[40]Victoria F. Nourse, **In Reckless Hands** (2008), hereafter cited as Nourse.
[41]316 U.S. at 541.
[42]The statement first appeared in an essay by Frankfurter on Justice Holmes that was published in *The Atlantic* (October 1938), 484. The essay was reprinted in Felix Frankfurter, **Law and Politics**, Archibald MacLeish and E. F. Prichard, Jr., eds. (1961), 61.
[43]Address before the Bar of the Supreme Court on the death of Chief Justice Fuller, 219 U.S. at xv. Wickersham was Attorney General in President Taft's administration and served from 1909 until 1913.
[44]304 U.S. 144 (1938).
[45]Nourse, 21.
[46]*Id*, 47.
[47]*Id*, 31.
[48]*Id.*, 14.
[49]*Buck v. Bell*, 276 U.S. 200, 207 (1927).
[50]Nourse, 87.
[51]316 U.S. at 537.
[52]Nourse, 90.
[53]Nourse notes that the details of the second offense have been lost. Nourse, 91, n.
[54]Nourse, 125.
[55]*Skinner v. State*, 115 P. 2d 123, 129 (Okla. 1941), Osborn, J., dissenting, quoted in Nourse, 134.
[56]*New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).
[57]"It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Id.*, 311 (Brandeis, J., dissenting).
[58]Nourse, 140.
[59]*Id.*, 141.
[60]Nourse, 147.
[61]See *id.*,152 n.
[62]316 U.S. at 541 (emphasis added).
[63]Nourse, 152.
[64]394 U.S. 618 (1969).
[65]478 U.S. 186 (1986).
[66]539 U.S. 558 (2003).
[67]David A. J. Richards, **The Sodomy Cases** (2009), hereafter cited as Richards.
[68]The author is no newcomer to the subject, having authored **The Case for Gay Rights: From *Bowers* to *Lawrence* and Beyond**, published by the University Press of Kansas in 2005.
[69]A current list of titles is available online at http://www.kansaspress.ku.edu/printbyseries.html (last visited on September 25, 2009).
[70]Richards, 1.
[71]*Id.*, 2.
[72]*Id.*, 84.
[73]*Id.*
[74]*Id.*, 85. It is unclear why Richards thought it pertinent to mention at this point, and then to emphasize again later, that the clerk was Mormon, in that the religious affiliations of others close to the case do not seem generally to be identified. In any event Powell, a Presbyterian, would presumably have been aware of that fact. *See id.*, 85, 106.
[75]*Id.*, 87.
[76]370 U.S. 660 (1962). The decision made the Eighth Amendment applicable to the states by way of the Fourteenth Amendment. Richards incorrectly identifies the case as "*Robinson v. Powell.*" *See* Richards, 89.
[77]Richards, 89.
[78]*Id.*, 90.
[79]*Id.*
[80]*Id.*, 91.
[81]*Id.*, 92.
[82]*Id.*, 104.
[83]*Id.*
[84]*Id.*, 105.
[85]*Id.*, 179.

[86]*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).
[87]Cliff Sloan and David McKean, **The Great Decision** (2009), hereafter cited as Sloan and McKean.
[88]*See* William E. Nelson, ***Marbury v. Madison*: The Origins and Legacy of Judicial Review** (2000).
[89]Charles Warren, **The Supreme Court in United States History** (rev. ed., 1926), vol. 1, 231–32.
[90]Sloan and McKean, x.
[91]*Id.*
[92]*Id.*, 63.
[93]5 U.S. at 165–66 (emphasis added).
[94]*Id.*, 167.
[95]Edward S. Corwin, **The Doctrine of Judicial Review** (1914), 59.
[96]Sloan and McKean, 169.
[97]William Van Alstyne, "A Critical Guide to *Marbury v. Madison*," 1969 *Duke Law Journal* 1, 29 (1969).
[98]*See Chisholm v. Georgia*, 2 U.S., 2 Dallas 419 (1793), probably the Court's first excursion into constitutional interpretation.
[99]David Schultz, **Encyclopedia of the United States Constitution**, 2 vols. (2009), hereafter cited as Schultz.
[100]*Id.*, xvii.
[101]*Id.*, xvi.
[102]53 U.S. (12 Howard) 299 (1851).
[103] 128 S.Ct. 2783 (2008).
[104] 6 Fed. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230).
[105]83 U.S. (16 Wallace) 36 (1873).

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Illustrations

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Errata

On page 165 of volume 34, issue number 2, the caption is inaccurate. The last sentence should be deleted, as the image is of the text of the Supreme Court's opinion in the *Civil Rights Cases*. On page 184 of volume 34, issue number 2, the President who signed the Sherman Antitrust Act into law in 1890 was incorrectly identified. It was Benjamin Harrison.